

SEX WORK, MIGRATION, AND THE UNITED STATES TRAFFICKING IN PERSONS REPORT: PROMOTING RIGHTS OR MISSING OPPORTUNITIES FOR ADVOCACY?

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I. INTRODUCTION

While the feminist debate on commercial sex reflects strong theoretical differences, all sides acknowledge the importance of studying women's experiences in particular situations.¹ Post-colonial feminist theory has sharpened the analysis of sex work by demonstrating the dangers of assuming a single narrative of victimization.² Women's accounts of sex work are affected by a multitude of factors, including economic inequality; the presence or absence of legal rights; and gender, ethnic, and class discrimination.³ The state plays an important role as it largely determines whether sex workers (both migrant and domestic) are viewed as victims, criminals, or working persons.⁴

In addition to domestic politics, the treatment of sex work is also increasingly affected by the global anti-trafficking movement and

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¹ See generally Moshoula Capous Desyllas, *A Critique of the Global Trafficking Discourse and U.S. Policy*, 4 J.SOC. & SOC. WELFARE 57 (2007); Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335 (2006). Due to space constraints, this article focuses on the potential impact of the Trafficking In Persons Report [hereinafter TIP Report] on female sex workers; it does not directly discuss other female migrant workers. This article frequently uses the terms "sex work" and "sex workers," although recognizing that this terminology is contentious and that structural feminists refer instead to "prostitution" and "prostituted women."

² See generally Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002).

³ See Ratna Kapur, *Post-Colonial Economies of Desire: Legal Representations of the Sexual Subaltern*, 78 DENV. U.L. REV. 855, 856-65 (2001).

⁴ See generally Jane Scoular, *What's Law Got to Do With It? How and Why Law Matters in the Regulation of Sex Work*, 37 J. L. & SOC'Y 12 (2010); Marjan Wijers, *Criminal, Victim, Social Evil or Working Girl: Legal Approaches to Prostitution and their Impact on Sex Workers*, presented at the Institute de la Mujer, Madrid, Spain, 2001, available at <http://www.nswp.org/sites/nswp.org/files/WIJERS-CRIMINAL.pdf>.

international law, as evidenced by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), a treaty that supplements the United Nations Convention Against Transnational Organized Crime and currently has 161 states parties.⁵ Although the Trafficking Protocol does not require states to prohibit sex work, it does require governments to prohibit all forms of human trafficking.⁶ Opponents of commercial sex often conflate sex work with trafficking, hoping to use the Trafficking Protocol as a tool to eradicate the sex industry. United States foreign policy also has been influential in shaping governments' anti-trafficking laws and policies.⁷

Since the enactment of the Victims of Trafficking and Violence Protection Act of 2000⁸ (VTVPA), the U.S. State Department has been "ranking" countries in an annual Trafficking in Persons (TIP) Report.⁹ On the positive side, the TIP Report has drawn more attention to the issue of human trafficking. It has also inspired many governments around the world to enact laws against human trafficking and to create programs to assist victims.¹⁰ But the annual TIP Report has been widely criticized, partly because of weaknesses in the methodology and perceived political bias but also because of the tendency to equate sex work with sex trafficking.¹¹

⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Supplementing the Convention Against Transnational Organized Crime, U.N. Doc. A/55/383 at 25, Nov. 15, 2000, 2237 U.N.T.S. 319 (listing states parties to the Protocol as of June 2014), *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en [hereinafter Trafficking Protocol]. For background information on the Trafficking Protocol and the Convention Against Transnational Organized Crime, see *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, U.N. OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/unodc/en/treaties/CTOC/> (last visited Jan. 19, 2015).

⁶ Trafficking Protocol, *supra* note 5, at art. 5.

⁷ See generally Anne Gallagher, *Human Rights and Human Trafficking: A Reflection on the Influence and Evolution of the U.S. Trafficking in Persons Reports*, in *FROM HUMAN TRAFFICKING TO HUMAN RIGHTS: REFRAMING CONTEMPORARY SLAVERY* (Alison Brysk and Austin Choi-Fitzpatrick, eds. 2011).

⁸ The Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, Div. A § 102, 114 Stat. 1466 (2000) (codified as 22 U.S.C. § 7101); The Trafficking Victims Protection Reauthorization Act of 2003 (H.R. 2620); The Trafficking Victims Protection Reauthorization Act of 2005 (H.R. 972); the Trafficking Victims Protection Reauthorization Act of 2008 (H.R. 7311); The Trafficking Victims Protection Reauthorization Act of 2013 (Title XII of the Violence Against Women Reauthorization Act of 2013) U.S. DEP'T OF STATE, *available at* <http://www.state.gov/j/tip/laws/> (last visited Nov. 30, 2014).

⁹ *Trafficking in Persons Report*, U.S. DEP'T OF STATE, <http://www.state.gov/j/tip/rls/tiprpt/> (last visited Nov. 30, 2014).

¹⁰ See Anne Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VIR. J. OF INT'L L. 789, 827 (2009).

¹¹ See generally Anne Gallagher, *Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Report*, 12 HUM. RTS. REV. 381 (2010), *available at* http://works.bepress.com/anne_gallagher/16.

Although the TIP Reports released in the past five years indicate a greater effort to address labor trafficking, the criteria for ranking governments continues to reflect strong disapproval of sex work. The United States has adopted this approach without making any concerted effort to listen to the voices of sex workers or to appreciate the possibility of collateral damage from anti-trafficking laws and policies.¹²

This article attempts to fill that gap by analyzing the impact of the United States TIP Report on sex workers in the Asia-Pacific region, focusing on the experiences of local and migrant sex workers in Hong Kong. A British colony from 1842 to 1997, Hong Kong is now a Special Administrative Region of China but continues to maintain its own immigration border and common-law legal system.¹³ Although Hong Kong does not have an elected government,¹⁴ it is respected for its commitment to the rule of law, independent judiciary, strong laws against corruption, and general respect for human rights.¹⁵ From 2001 to 2008, Hong Kong was ranked “Tier 1” in the U.S. TIP Reports, significantly above Mainland China.¹⁶ Hong Kong, however, was demoted to Tier 2 in 2009, and it has

¹² See, e.g., Desyllas, *supra* note 1; Ann Jordan, *Nothing About Us Without Us*, ON THE ISSUES MAG., (Summer 2008) http://www.ontheissuesmagazine.com/july08/july2008_2.php; Rhacel Salazar Parreñas, *Trafficked? Filipino Hostesses in Tokyo's Nightlife Industry*, 18 YALE J.L. & FEMINISM 145 (2006).

¹³ For a general introduction to the “one country, two systems” model, see generally YASH GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW* (2d ed. 1999).

¹⁴ The central government of the People's Republic of China currently appoints the Chief Executive of Hong Kong following an “election” by a committee 1200 members. See The Basic Law of the Hong Kong Special Administrative Region of Hong Kong art. 45 and Annex I. For discussion of recent proposals for reform, see *Academic Roundtable: “Universal Suffrage and Nomination Procedures: Imperatives from Article 25 ICCPR,”* H.K.U. CTR. FOR COMP. & PUB. L. (Mar. 20, 2014), <http://www.law.hku.hk/ccpl/events/Article25ICCPR.html>. For a sample of the recent coverage of pro-democracy demonstrations in Hong Kong, see Keith Bradsher, Michael Forsythe & Chris Buckley, *Huge Crowds Turn Out for Pro-Democracy March in Hong Kong, Defying Beijing*, N.Y. TIMES, July 1, 2014, available at <http://www.nytimes.com/2014/07/02/world/asia/hong-kong-china-democracy-march.html>.

¹⁵ This is not to suggest that Hong Kong does not have controversies, but it ranks above many countries in the Asia-Pacific region (particularly in civil liberties) and well above Mainland China. Compare Carole J. Petersen, *From British Colony to Special Administrative Region of China: Embracing Human Rights in Hong Kong*, in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE, AND THE UNITED STATES 224 (Randall Peerenboom, Carole J. Petersen & Albert H.Y. Chen eds., 2006), with Randall Peerenboom, *Human Rights in China*, in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE, AND THE UNITED STATES, *supra*, at 413.

¹⁶ See U.S. DEP'T OF STATE, *supra* note 9 (listing Hong Kong as Tier 1 from 2001 to 2008). In contrast China was placed in the Tier 2 Watch List for many years, dropped to Tier 3 in 2013, and returned to the Tier 2 Watch List in 2014. See U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT* 132–134 (2014), available at <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226700.htm>.

remained there for the past six years¹⁷ despite the government's insistence that it has intensified efforts to combat human trafficking since 2009.¹⁸ The territory thus provides an interesting case study of the TIP Report and the policy decisions that the United States would like the Hong Kong government to make in order to regain its Tier 1 ranking.

Part II of the article reviews the feminist debate on commercial sex and the four main approaches that have been adopted in domestic laws around the world: (1) prohibitionist; (2) partial decriminalization; (3) full legalization; and (4) abolitionist (which treats sex workers as victims but punishes pimps and also those who purchase sex).

Part III analyzes the relationship between this feminist debate and the global anti-trafficking movement, particularly the definition of "trafficking" that was adopted in the Trafficking Protocol, the criteria that the U.S. State Department applies when ranking nations in the annual TIP Report, and the incentive for countries placed in low tiers to adopt laws and policies that discourage or prohibit commercial sex.

Part IV then analyzes the relationship among sex work, migration, and trafficking in the context of Hong Kong.¹⁹ The research on local and migrant sex workers in Hong Kong reveals significant variations in women's motivations, exposure to violence, and ability to exercise agency in their working lives. It also reveals that local sex workers are using general human rights treaties and the U.N. treaty-monitoring bodies to advocate for their rights. This raises serious concerns regarding the approach taken by the TIP Report, which unilaterally ranks governments' anti-trafficking measures according to criteria set by U.S. politicians (rather than by international law) and may undermine the efforts of local sex workers to improve their working conditions. While the State Department has correctly highlighted a number of weaknesses in Hong Kong's legal framework, particularly in the legal definition of trafficking and in the system for identification of potential victims, this article concludes that the TIP Report has oversimplified the issues and ignored the potential for collateral damage if Hong Kong were to fully implement the recommendations in the TIP Report.

¹⁷ See U.S. DEP'T OF STATE, *supra* note 9, available at <http://www.state.gov/j/tip/rls/tiprpt/> (listing Hong Kong as Tier 1 from 2001 to 2008 and as Tier 2 from 2009 to 2014).

¹⁸ See *infra* Part IV(D).

¹⁹ This article focuses on local and migrant sex workers in Hong Kong and does not directly address migrant domestic workers, who also feature prominently in the U.S. TIP Reports. For previous research on this group and recommendations for the Hong Kong government, see Peggy W.Y. Lee & Carole J. Petersen, Occasional Paper No. 16, *Forced Labour and Debt Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers*, H.K.U. CTR. FOR COMP. & PUB. L. (2006), available at <https://www.law.hku.hk/ccpl/pub/Documents/16-LeePetersen.pdf>.

II. THE FEMINIST DEBATE ON SEX WORK AND DOMESTIC LEGAL FRAMEWORKS

Although the legal treatment of commercial sex around the world is complex,²⁰ the various legal frameworks can be grouped into four main approaches: (1) prohibitionist (the approach taken by most states in the United States, which involves criminalizing the actions of sex workers, pimps, and customers); (2) partial decriminalization (which generally does not prohibit sex work itself but does prohibit many associated activities, such as soliciting, pimping, and operating a brothel); (3) full legalization (although often within a regulatory framework that seeks to prevent trafficking and the involvement of minors); and (4) abolitionist (which punishes pimps and also those who purchase sex but treats sex workers as victims).²¹ This section of the article analyzes these four approaches and the feminist debate on the legal treatment of commercial sex, which has fundamentally affected the international anti-trafficking movement.

Although sex work has been one of the most strongly contested issues in feminist legal theory, feminists generally agree that the prohibitionist approach taken by most states in the United States works to the disadvantage of women.²² The American Civil Liberties Union (ACLU) argued, as early as the 1970s, that state-level criminal prohibitions on sex work violate the right to equal protection because the laws primarily have the effect of punishing female sex workers.²³ However, with few exceptions (e.g. certain counties in Nevada), sex work continues to be prohibited under state law, and sex workers are regularly prosecuted in the United States for soliciting and other offenses.²⁴ Despite these strict laws, there is a thriving

²⁰ For examples of different legal frameworks in the Asia-Pacific region, see generally JOHN GOODWIN, *SEX WORK AND THE LAW IN ASIA AND THE PACIFIC* (2012), available at http://www.undp.org/content/dam/undp/library/hiv_aids/English/HIV-2012-SexWorkAndLaw.pdf.

²¹ While the term “abolitionist” is sometimes used to refer generally to legal systems that prohibit all forms of commercial sex, in this article it will be used to refer to systems that prohibit the buying of sex and pimping while simultaneously decriminalizing the actions of sex workers themselves.

²² See generally APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN’S LIVES: SEX, VIOLENCE, WORK AND REPRODUCTION 187–98 (D. Kelly Weisberg ed., 1996) (summarizing approaches taken by liberal, radical, Marxist, and social feminists and introducing essays written by Judith R. Walkowitz, Lars O. Ericsson, Carole Pateman, Catharine MacKinnon, Jody Freeman, Mary Joe Frug, and Margaret A. Baldwin).

²³ See Lars O. Ericsson, *Charges Against Prostitution: An Attempt at a Philosophical Assessment*, as reprinted in APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN’S LIVES: SEX, VIOLENCE, WORK AND REPRODUCTION, *supra* note 22, at 208–26.

²⁴ See generally Penelope Saunders, et al., *Human Rights Violations of Sex Workers, People in the Sex Trades, and People Profiled as Such: Submission to the United Nations Universal Periodic Review of the United States of America Second Cycle 22nd Session of the Working Group on the Universal Periodic Review*, HUMAN RIGHTS COUNCIL, May 2015 (documenting prosecution of sex workers throughout the United States, with the exception of certain counties in Nevada where sex

underground commercial sex industry throughout the United States.²⁵

In contrast to the “prohibitionist” approach, classic liberal philosophy views sex work as a legitimate form of work, provided that there is no coercion. This is derived from the broader liberal position that private and consensual sexual conduct should not be regulated by criminal law. Liberal feminists generally support either decriminalization or legalization within a regulatory framework. Liberal feminists typically concede that sex workers run a greater risk of gender-based violence than the typical working woman, but they believe that legalization can reduce the risk of violence as sex workers are then less vulnerable to exploitation by organized crime and can seek police protection from violent clients or pimps.²⁶ Although the Netherlands is widely considered the leading example of this approach, legalization has also been pursued in Germany, Iceland, Switzerland, Austria, Denmark, Greece, Turkey, Hungary, and Latvia.²⁷ Certain agencies of the United Nations (including UNAIDS and UN Women) also have embraced this position and expressed support for legalization of sex work when conducted by consenting adults.²⁸ In the Asia-Pacific region, full legalization of sex work is rare, but it has been pursued in New Zealand and parts of Australia. Partial decriminalization or toleration of sex work in certain “red light” districts is far more common among Asia-Pacific jurisdictions.²⁹

Structural feminists (also referred to as radical feminists) disagree vehemently with the legalization of commercial sex because they view it as inherently forced and violent.³⁰ This approach is often referred to as

work is heavily regulated), available at <http://www.bestpracticespolicy.org/wp-content/uploads/2013/01/2014UPRRReportBPPPDASWOPNYC1.pdf>.

²⁵ See generally MERIDITH DANK ET AL., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR AMERICAN CITIES (2014).

²⁶ For additional examples of how legalization may reduce harms to sex workers, see, for example, Michele Alexandre, *Sex, Drugs, Rock & Roll and Moral Dirigisme: Toward a Reformation of Drug and Prostitution Regulations*, 78 UMKC L. REV. 101 (2009); WHO, *Violence Against Sex Workers and HIV Prevention*, 3 INFORMATION BULLET SERIES (2005), available at <http://www.who.int/gender/documents/sexworkers.pdf>.

²⁷ See ELAINE MOSSMAN, INTERNATIONAL APPROACHES TO DECRIMINALISING OR LEGALISING PROSTITUTION 6, 12 (2007), available at www.procon.org/sourcefiles/new_zealand_gov.pdf (prepared for the New Zealand Ministry of Justice); Erika Schulze, SEXUAL EXPLOITATION AND PROSTITUTION AND ITS IMPACT ON GENDER EQUALITY 31 (2014) (study completed for the European Parliament’s Committee on Women’s Rights and Gender Equality), available at [http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2014/493040/IPOL-FEMM_ET\(2014\)493040_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2014/493040/IPOL-FEMM_ET(2014)493040_EN.pdf).

²⁸ See U.N. WOMEN, NOTE ON SEX WORK, SEXUAL EXPLOITATION AND TRAFFICKING (OCT. 9, 2013), <http://www.nswp.org/sites/nswp.org/files/UN%20Women's%20note%20on%20sex%20work%20sexual%20exploitation%20and%20trafficking.pdf>.

²⁹ See generally GOODWIN, *supra* note 20.

³⁰ See e.g., Jane Scoular, *The ‘Subject’ of Prostitution: Interpreting the discursive, Symbolic and Material Position of Sex/Work in Feminist Theory*, 5(3) FEMINIST THEORY 343, 344 (2004); Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 20 (1993).

“abolitionist” (or “neo-abolitionist”) because it advocates for the complete abolition of commercial sex.³¹ Abolitionists do not use the term “sex worker” because they do not view commercial sex as the sale of services; rather, they view commercial sex as the sale of a human being and use the term “prostituted woman” to convey the lack of individual choice.³² They compare prostitution to slavery, rape, and torture, and they view “prostituted women” as victims of crime.³³ Abolitionists deny that a woman could ever enter prostitution of her own free will; rather, they argue that a woman in prostitution suffers so much physical torture and psychological trauma that she eventually loses her free will as well as her identity and ability to express feelings.³⁴ In any event, just as society does not permit an individual to sell herself into slavery, abolitionists do not recognize any right to become a prostituted woman.

While abolitionists strongly oppose legalization or decriminalization of commercial sex, they do not support prosecuting “prostituted women.”³⁵ Instead, they argue that the criminal law should prohibit only the buying of sex and the selling of a person, thus punishing customers and pimps but not sex workers themselves. Swedish law is the leading example of this approach,³⁶ and abolitionists often point to it as a model for other nations.³⁷ There are competing views on whether the Swedish model is in the best interest of sex workers.³⁸ A Norwegian Working Group that was appointed to study the Swedish model concluded that it was difficult to enforce and

³¹ However, some commentators prefer to use “prohibitionist” to describe this approach. See, e.g., Ronald Weitzer, *The Mythology of Prostitution: Advocacy Research and Public Policy*, 7 SEXUALITY RES. SOC. POL’Y 15, 16 (2010).

³² Catherine A. MacKinnon, *Trafficking, Prostitution and Inequality*, 46 HARV. C.R.-C.L.L. REV. 271, 272-74 (2011).

³³ See, e.g., MacKinnon, *supra* note 30; SHEILA JEFFREYS, *THE IDEA OF PROSTITUTION* (1997).

³⁴ See Melissa Farley, *Sex for Sale: Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly* 18 YALE J.L. & FEMINISM 109, 131–132 (2006).

³⁵ See generally Janice G. Raymond, *Prostitution on Demand: Legalizing the Buyers as Sexual Consumers*, 10 VIOLENCE AGAINST WOMEN 1156 (2004), available at <http://www.sagepub.com/walshstudy/articles/section12/Raymond.pdf>.

³⁶ See Gunilla Ekberg, *The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings*, 10 VIOLENCE AGAINST WOMEN 1187 (2004) (presenting a positive view of the Swedish legislative framework), available at <http://www.prostitutionresearch.com/pdf/EkbergVAW.pdf>.

³⁷ See, e.g., Raymond, *supra* note 35, at 1158 (describing the Swedish Law as a model in targeting demand for sex and “men who use and abuse women in prostitution”).

³⁸ See, e.g., Gwladys Fuche, *Prostitution, Nordic Style: Why sex workers say they’re more at risk than ever*, THE GLOBE & MAIL (Apr. 28, 2014, 7:36 AM), <http://www.theglobeandmail.com/news/world/prostitution-nordic-style-why-sex-workers-say-theyre-more-at-risk-than-ever/article18297909/>; May-Len Skilbrei & Charlotta Holmstrom, *The ‘Nordic Model’ of Prostitution Law is a Myth*, THE CONVERSATION (Dec. 16, 2013, 6:43 AM), <http://theconversation.com/the-nordic-model-of-prostitution-law-is-a-myth-21351>.

made life more dangerous for many sex workers because the industry had been pushed underground.³⁹ Nonetheless, in 2008, the Norwegian Parliament decided to follow the Swedish model and criminalize the purchase of sexual services.⁴⁰ Modified versions of the Swedish approach have since been adopted in Finland and in South Korea.⁴¹ A bill criminalizing the purchase of sexual services was adopted by the French Assembly in December 2013 but it was then rejected by the French Senate in 2014.⁴² Canada also recently enacted a bill based upon the Swedish model, which will almost certainly be challenged in court.⁴³

Abolitionists are also very active in the United States, but they have not made much headway with state legislators. Indeed, many states still treat juveniles found in prostitution as delinquents (rather than as victims), although there is a movement to change this through “safe-harbor” laws.⁴⁴ Some states have also increased the penalties for customers or made more of an effort to enforce the laws against customers, rather than simply targeting sex workers.⁴⁵

³⁹ WORKING GROUP ON THE LEGAL REGULATION OF THE PURCHASE OF SEXUAL SERVICES, PURCHASING SEXUAL SERVICES IN SWEDEN AND THE NETHERLANDS (2004) (Nor.), available at <http://www.regjeringen.no/en/dep/jd/Documents-and-publications/Reports/Reports/2004/Purchasing-Sexual-Services.html?id=106214>.

⁴⁰ For the announcement and text of the bill in Norwegian and English, see *Criminalizing the Purchase of Sexual Activity*, NOR. MINISTRY J. & POLICE (Dec. 1, 2008), <http://www.regjeringen.no/en/dep/jd/whats-new/News/2008/criminalizing-the-purchase-of-sexual-ac.html?id=537854>.

⁴¹ See Ji Hye Kim, *Korea's New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature's Intent to Protect Prostitutes from Abuse*, 16 PAC. RIM L. & POL'Y J. 493, 508 (2007) (providing analysis of the law and unintended consequences).

⁴² In December 2013, the French National Assembly (the lower house of the French national parliament) voted to criminalize the purchase of sex while decriminalizing sex workers; the bill was considered by the French Senate in the summer of 2014 but rejected. See *Turning Off the Red Light*, ECONOMIST, Dec. 7, 2013, at 55, available at <http://www.economist.com/node/21591220/>; International Committee on the Rights of Sex Workers in Europe, *French Senate's Special Commission Rejects Criminalization of Clients* (July 8, 2014), <http://www.sexworkeurope.org/news/general-news/french-senates-special-comission-rejects-criminalisation-clients>.

⁴³ See M.D., *Dearer for Johns*, ECONOMIST (June 5, 2014, 7:41 AM), <http://www.economist.com/node/21603429/>; Julie Kaye, *Canada's Flawed Sex Trade Law*, N.Y. TIMES, Jan. 20, 2015, available at <http://www.nytimes.com/2015/01/21/opinion/canadas-flawed-sex-trade-law.html>. Ironically, the legislation was prompted by the unanimous decision by the Canadian Supreme Court in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 (Can.) (declaring unconstitutional criminal laws that prohibited certain actions associated with sex work, including living on avails of prostitution and communicating in public for purposes of prostitution, but suspending the declaration of invalidity for one year).

⁴⁴ Some states are also starting to allow women to expunge convictions if they can demonstrate that they were victims of sex trafficking. See Carrie N. Baker, *The Influence of International Human Trafficking on United States Prostitution Laws: The Case of Expungement Laws*, 62 SYRACUSE L. REV. 171, 180 (2012).

⁴⁵ See *How to Eliminate Demand*, DEMAND ABOLITION, <http://www.demandabolition.org/how-to-eliminate-demand/legislation/> (last visited June 1, 2014).

While the feminist debate on sex work is often presented as an argument between two clearly defined sides (liberal and structural feminists), many different strains of feminist theory have contributed to the debate. For example, essentialist and third-wave feminists have moved beyond the “harm reduction” analysis, arguing that women can find liberation and empowerment through sex work.⁴⁶ Post-colonial feminist theory has challenged the very concept of a universal narrative and the tendency to focus only on gender discrimination while overlooking imperialism, ethnic discrimination, and the capacity of sex workers to exercise agency.⁴⁷ It is also clear that even societies with similar cultural traditions can come to very different conclusions on sex work, as evidenced by the fact that legal systems with predominantly Chinese populations have taken a variety of different approaches. For example, the People’s Republic of China prohibits sex work and subjects sex workers and customers to periodic “crackdowns” by the police.⁴⁸ In contrast, in Singapore, sex work itself is legal and even brothels are permitted in certain “red light” districts through a *de-facto* licensing system.⁴⁹ The government of Taiwan also decided to legalize sex work within restricted areas,⁵⁰ a move that was, however, strongly opposed by certain organizations in Taiwan that take a

⁴⁶ See, e.g., APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN’S LIVES: SEX, VIOLENCE, WORK AND REPRODUCTION, *supra* note 22, at 191.

⁴⁷ See generally RATNA KAPUR, EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM (2005); CHANDRA TALPADE MOHANTY, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, in THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM 51 (Chandra Talpade Mohanty, Ann Russo & Lourdes Torres, eds., 1991).

⁴⁸ See K.M., *Crackdown on Sin City*, ECONOMIST (Feb. 14, 2014, 12:39 AM), <http://www.economist.com/blogs/analects/2014/02/prostitution-china>.

⁴⁹ For an explanation of this system from the point of view of a sex worker advocacy organization and how it leaves sex workers vulnerable to abuse by the police, see *Situation in Singapore*, PROJECT X, <http://theprojectx.org/situation-in-singapore/> (last visited Jan. 19, 2015, 9:45 PM). See also Tan Shin Bin & Alisha Gill, *Containing Commercial Sex to Designated Red Light Areas: An idea past its prime?*, LEE KUAN YEW SCH. PUB. POL’Y, NAT’L UNIV. SING. (2013), available at <http://lkyspp.nus.edu.sg/wp-content/uploads/2014/04/Containing-Commercial-Sex-to-Designated-Red-Light-Areas.pdf>.

⁵⁰ In 2011, Taiwan decriminalized commercial sex in certain “penalty-free” zones but also amended the legal framework so that pimps and customers (as well as sex workers) will be fined if they engage in commercial sex outside the penalty-free zones. See Amber Wang, *Effectiveness of Legal Sex Industry Zones Debated*, TAIPEI TIMES, Nov. 07, 2011, at 2, available at <http://www.taipeitimes.com/News/taiwan/archives/2011/11/07/2003517701>. For media coverage of the history of the legislation, see Loa Iok-sin & Shih Hsiu-chuan, *Ministry Proposes Legalizing Sex Trade*, TAIPEI TIMES, June 13, 2009, at 1, available at <http://www.taipeitimes.com/News/front/archives/2009/06/13/2003446058>; Amber Wang, *Groups Oppose Legalizing Sex Trade*, TAIPEI TIMES, July 10, 2009, at 2, available at <http://www.taipeitimes.com/News/taiwan/archives/2009/07/10/2003448261>; Flora Wang and Loa Iok-sin, *Legislator Proposes Bill to Decriminalize Prostitution*, TAIPEI TIMES, Apr. 13, 2009, at 2, available at <http://www.taipeitimes.com/News/front/archives/2009/04/13/2003440944>.

more abolitionist approach.⁵¹ Finally, in Hong Kong, which is discussed in detail in Part IV of this article, a local woman may legally engage in sex work so long as she works alone and does not solicit; but migrant sex workers are regularly prosecuted for immigration offenses.⁵²

This summary of the wide variations in national approaches to sex work provides the background for the next section of the article, on the definition of human trafficking in international law, the criteria used in the U.S. TIP Report, and the potential impact on domestic laws concerning sex work.

III. SEX WORK, TRAFFICKING, AND THE POWER OF THE ANNUAL TRAFFICKING IN PERSONS REPORT

The feminist debate on sex work has fundamentally affected the development and application of international instruments against human trafficking. Although the Trafficking Protocol is not limited to sex trafficking (but rather includes labor trafficking and other forms of exploitation), the disagreement on how to address sex work in the treaty dominated the negotiations and almost prevented the drafters from agreeing upon an international definition of human trafficking.⁵³ Abolitionists argued that any third party who facilitates a woman's movement into the sex industry should be considered a "trafficker" under international law, regardless of whether the sex worker consented.⁵⁴ During the negotiation of the Trafficking Protocol, this view was represented by the International Human Rights Network, an alliance of feminist and religious organizations

⁵¹ See *Taiwan – Stop Legalising Prostitution, NGOs Tell Taiwan Government*, FORUM-ASIA (Nov. 30, 2009, 9:08 PM), <http://www.forum-asia.org/?p=6848>; *Fight Against the Legalization of Prostitution in Taiwan*, COAL. AGAINST TRAFFICKING IN WOMEN (Nov. 6 2009), <http://www.catwinternational.org/Home/Article/29-fight-against-the-legalization-of-prostitution-in-taiwan> (endorsing views of the Garden of Hope Foundation and the Taipei Women's Rescue Foundation and warning against "state sponsored" prostitution). See also Editorial, *Taiwan's Prostitution Conundrum*, TAIPEI TIMES, June 17, 2009, at 8, available at <http://www.taipeitimes.com/News/editorials/archives/2009/06/17/2003446355>. For a summary of the debate in Taiwan on the nature of the regulatory framework that should be adopted and whether a married sex worker should obtain her spouse's consent, see *Married Prostitutes May Have to Get their Spouses' Consent*, CHINA POST (Feb. 3, 2010, 9:38 AM), <http://www.chinapost.com.tw/taiwan/national/national-news/2010/02/03/243389/Married-prostitutes.htm6>.

⁵² See generally, Karen Joe Laidler, Carole J. Petersen, & Robyn Emerton, *Bureaucratic Justice: The Incarceration of Mainland Chinese Women Working in Hong Kong's Sex Industry*, 51 INT'L J. OFFENDER THERAPY AND COMP. CRIMINOLOGY 68 (2007); *infra* Part IV.

⁵³ These negotiations are only briefly summarized here. For more detailed discussion, see Robyn Emerton, Karen Joe Laidler & Carole J. Petersen, *Trafficking of Mainland Chinese Women into Hong Kong's Sex Industry: Problems of Identification and Response*, 2 ASIA-PAC. J. ON HUM. RTS. & L. 35, 42–50 (2007).

⁵⁴ *Id.* See also Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law & Policy*, 158 U. PA L. REV. 1665, 1676 (2010).

led by the Coalition Against Trafficking in Women (CATW).⁵⁵

In contrast, organizations that hold a labor rights perspective argued for a distinction between voluntary sex work and sex trafficking. During the negotiations of the Trafficking Protocol, this was the position of the Human Rights Caucus, which included the Global Alliance Against Traffic in Women (GAATW) and the Global Network of Sex Work Projects.⁵⁶ It was also consistent with the views of Ms. Radhika Coomeraswamy, who was at that time the United Nations Special Rapporteur on Violence against Women.⁵⁷ The United States, which was under the leadership of the Clinton administration at the time, also supported this position during the negotiation of the Trafficking Protocol.⁵⁸ That would change dramatically, however, under the administration of George W. Bush.

This debate on the relationship between commercial sex and the definition of trafficking is significant for governments because the Trafficking Protocol requires states parties to criminalize human trafficking and to take law enforcement measures to prevent and punish it.⁵⁹ The Trafficking Protocol also calls upon states parties to provide assistance and protection to victims of trafficking (although these provisions are phrased in weaker language than the law enforcement provisions⁶⁰) and to provide remedies for victims of trafficking.⁶¹ Thus, if the abolitionist approach had been adopted in the treaty, the number of individuals who should be considered “victims of trafficking” (and thus warrant assistance) would naturally increase. Countries that had already legalized or partly decriminalized commercial sex would also have been pressured to amend their criminal laws and adopt an abolitionist approach.

Eventually, a compromise was reached, one that reveals the influence

⁵⁵ For information and publications from CATW, see COALITION AGAINST TRAFFICKING IN WOMEN, <http://www.catwinternational.org> (last visited Feb. 2, 2014).

⁵⁶ For examples of policy papers that take a labor-rights perspective, see generally GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, <http://www.gaatw.org> (last visited Jan. 19, 2015, 9:54 PM), or GLOBAL NETWORK OF SEX WORK PROJECTS, <http://www.nswp.org> (last visited Jan. 19, 2015, 9:55 PM).

⁵⁷ Ms. Coomeraswamy argued that the definition of trafficking should focus on coercion and lack of consent; she also included situations of debt-bondage. See Special Rapporteur on Violence Against Women, *Integrations of the Human Rights of Women and the Gender Perspective, Violence against Women*, Comm’n on Human Rights, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) (by Radhika Coomeraswamy).

⁵⁸ See Halley, Kotiswaran, Shamir & Thomas, *supra* note 1, at 355–60 (noting criticism of the Clinton administration by abolitionists and religious groups).

⁵⁹ Trafficking Protocol, *supra* note 5, ¶¶ 5, 10.

⁶⁰ *Id.* ¶¶ 6–8. The victim assistance provisions contain a good deal of discretionary language such as, “in appropriate cases” and “endeavor to provide.” *Id.* ¶ 6(1)–(5). In contrast, the treaty states that states parties “shall” criminalize trafficking and take various law enforcement actions. *Id.* ¶¶ 5, 10.

⁶¹ See generally ANNE T. GALLAGHER, *THE RIGHT TO AN EFFECTIVE REMEDY FOR VICTIMS OF TRAFFICKING IN PERSONS: A SURVEY OF INTERNATIONAL LAW AND POLICY* (2010), available at http://www.ohchr.org/Documents/Issues/Trafficking/Bratislava_Background_paper1.pdf.

of both the abolitionist and the liberal perspectives on sex work. The definition of “trafficking in persons” contained in Article 3 of the Trafficking Protocol requires three elements if the alleged victim is an adult: (i) an “action” (e.g. recruitment, transportation, transfer, harboring, or receipt of persons); (ii) an improper “means” (e.g. threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or a position of vulnerability, or the giving or receiving of payments or benefits to achieve consent of a person having control over another person); and (iii) that the action be taken for the purpose of exploitation.⁶² Article 3a further provides that “exploitation” shall include, at a minimum “the exploitation of the prostitution of others or other forms of sexual exploitation,” and Article 3b states that the “consent of a victim to the intended exploitation . . . shall be irrelevant where any of the means set forth in subparagraph (a) have been used.”⁶³

Unfortunately, two key terms—“exploitation of the prostitution of others” and “abuse of power or of a position of vulnerability”—are not defined in the treaty. While the last-minute inclusion of these somewhat vague terms helped to achieve consensus for the purposes of drafting the treaty, they also made it possible for all sides of the feminist debate on sex work to argue that the Trafficking Protocol endorses their view.⁶⁴ For example, abolitionists can argue that the definition of trafficking includes situations in which a woman may have appeared to have given consent but was actually recruited into the sex industry by means that exploited her poverty or lack of education—as these could combine to constitute a position of vulnerability. The Travaux Préparatoires (the official interpretative notes to the Trafficking Protocol) do not provide much guidance, noting only that an “abuse of a position of vulnerability” can arise in a situation in which the person involved “has no real and acceptable alternative but to submit to the abuse involved.”⁶⁵

The drafting history does, however, make it clear that governments should be able to ratify the Trafficking Protocol while continuing to take

⁶² Trafficking Protocol, *supra* note 5, ¶ 3a. If the alleged victim is a child then there is no need to show that the action was accomplished through one of the listed means; elements (i) and (iii) are sufficient.

⁶³ *Id.* ¶¶ 3a, 3b.

⁶⁴ See generally U.N. OFFICE ON DRUGS AND CRIME, ABUSE OF A POSITION OF VULNERABILITY AND OTHER “MEANS” WITHIN THE DEFINITION TRAFFICKING IN PERSONS (2013), available at http://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf.

⁶⁵ Rep. of the Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime on the Work of its First to Eleventh Sessions, ¶ 63, U.N. Doc. A/55/383/Add.1; GAOR, 55th Sess. (Nov. 3, 2000) [hereinafter *Travaux Préparatoires*], available at http://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf.

different approaches to sex work within their domestic legal systems.⁶⁶ This should mean that the legal definition of “trafficking victim” can also vary among states parties to the Trafficking Protocol. For example, if a government purports to embrace the abolitionist view, then it should view every “prostituted woman” as a victim of trafficking. Alternatively, governments that do not adopt the abolitionist approach to sex work should not be criticized if they adopt a somewhat narrower definition of “trafficking victim” (although they should, of course, develop a screening system to determine whether a person found working in the sex industry has acted under her own volition or is a victim of trafficking).

In addition to affecting debates on how to define human trafficking, the competing views of sex work have also affected debates on how best to deter it. Proponents of legalization often argue that this will bring the sex industry into the light of day and make it easier for the authorities to limit participation to adult women who have a legal right to work in the jurisdiction.⁶⁷ In theory, legalization would also provide an incentive for sex workers and customers to report abusive situations (e.g. the presence of minors), as they need not fear prosecution themselves.

In contrast, abolitionists believe that legalization only increases the demand for commercial sex and that customers and pimps will continue to seek young girls and migrant women, either because they are considered more exotic or because they are more compliant and easily manipulated.⁶⁸ Abolitionists, therefore, argue that strong laws against the purchase of sexual services are the best way to prevent trafficking. The Swedish government certainly believes that its abolitionist approach has worked and that it now has fewer trafficking victims than neighboring countries.⁶⁹ Thus, even governments that do not fully accept the structural feminist account of commercial sex (that all “prostituted women” are victims) might rationally decide to adopt an abolitionist approach on the basis that it may help to decrease demand for commercial sex and thus deter sex trafficking. For

⁶⁶ *Id.* ¶ 64 (noting that the “terms ‘exploitation of the prostitution of others’ or ‘other forms of sexual exploitation’ are not defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws”).

⁶⁷ RONALD WEITZER, *LEGALIZING PROSTITUTION: FROM ILLICIT VICE TO LAWFUL BUSINESS* 76-77 (2012) (noting that jurisdictions that legalize sex work generally regulate it, with the objective of reducing the harms of sexual commerce).

⁶⁸ See, e.g., Janice G. Raymond, *Ten Reasons For Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, 2 J. TRAUMA PRAC., 315-32 (2003), available at <http://www.embracedignity.org/uploads/10Reasons.pdf>. See also Ambassador Swanee Hunt, *Deconstructing Demand: The Driving Force of Sex Trafficking*, 19 BROWN J. WORLD AFF. (SPRING-SUMMER ISSUE) 2 (2013) (arguing that “[l]egalizing the buying and selling of bodies does not have the dignifying and regulating effect” that proponents hope for and that “the average age in which a girl enters prostitution in the United States is 13”), available at <http://www.demandabolition.org/deconstructing-demand/>.

⁶⁹ See Ekberg, *supra* note 36, at 1199.

example, the Norwegian government cited its desire to reduce “the trafficking of foreign nationals into Norway for sexual exploitation” as the primary reason for criminalizing the buying of sex, although individual transactions for sexual services had been decriminalized in Norway for more than a century.⁷⁰ This demonstrates how local sex workers—who may not view themselves as “victims of trafficking” —can nonetheless be affected by the global anti-trafficking movement.

This phenomenon became particularly apparent during the second Bush administration, when the United States appointed itself as a sort of “global sheriff” of the anti-trafficking movement and also adopted an abolitionist approach—not only in the annual TIP Report, but also in federal regulations requiring non-governmental organizations to adopt a policy against prostitution in order to receive funding.⁷¹ The impact on sex workers and migrant women generally has become increasingly controversial,⁷² particularly in the Asia-Pacific region.⁷³

South Korea provides a striking example of how structural feminist views of sex work and the U.S. TIP Report can combine to inspire changes to domestic laws. In 2000, a coalition of Korean feminists (Korean Women’s Association United or “KWAU”) began an abolitionist campaign in hopes of enacting a law based upon the Swedish model.⁷⁴ The South Korean government initially endorsed KWAU’s proposal but not necessarily because it accepted the structural feminist analysis of sex work. Rather, the U.S. State Department had placed South Korea in “Tier 3” in its 2001 TIP Report, and the South Korean government was, no doubt, hoping to improve its dismal rating.⁷⁵ Unfortunately, the legislation that was

⁷⁰ State Sec’y Astri Aas-Hansen, Speech at Third European Union Anti-Trafficking Day (Oct. 20, 2009), http://www.regjeringen.no/en/dep/jd/aktuelt/taler_og_artikler/politisk_ledelse/statssekretaer-aas-hansen/2009/speech-at-the-third-eu-anti-trafficking-.html?id=582338. Until November 2008 Norway permitted individuals to buy and sell sexual services, prohibiting only acts of organizing prostitution. *Id.*

⁷¹ See generally Edi C. Kinney, *Appropriations for the Abolitionists: Undermining Effects of the U.S. Mandatory Anti-Prostitution Pledge in the Fight Against Human Trafficking and HIV/AIDS*, 21 BERKELEY J. GENDER L. & JUST. 158, 170–172 (2006).

⁷² See, e.g., Desyllas, *supra* note 1; Parrenas, *supra* note 12; Jordan, *supra* note 12.

⁷³ See, e.g., Ratna Kapur, *The “Other” Side of Globalization: The Legal Regulation of Cross-Border Movements*, 22 CAN. WOMEN’S STUD. 6, 7–8 (2003), available at <http://pi.library.yorku.ca/ojs/index.php/cws/article/viewFile/6408/5596>; Ratna Kapur, *Travel Plans: Border Crossings and the Rights of Transnational Migrants*, 18 HARV. HUM. RTS. J. 107, 113–15 (2003), available at <http://www.law.harvard.edu/students/orgs/hrj/iss18/kapur.pdf>.

⁷⁴ See Kim, *supra* note 41, at 519–20. At that time prostitution was officially prohibited in South Korea but largely tolerated in certain “red-light” districts. The KWAU publicized examples of human rights violations in the industry, including a tragic fire that killed five sex workers who were locked in a room by the brothel owner after working hours. *Id.* at 493, 495.

⁷⁵ U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REP.* 97 (2001), available at <http://www.state.gov/documents/organization/4107.pdf>. Although the U.S. recognized that South Korea generally had a positive human rights record, the U.S. placed South Korea in Tier 3,

eventually enacted in 2004 did not fully embrace the Swedish approach, but, rather, the law continued to criminalize the selling (as well as the buying) of sex, leaving it to prosecutors to determine whether a sex worker was a “victim” or a law-breaker.⁷⁶

After the new law was enacted, more than two thousand South Korean sex workers took to the streets in protest and some threatened suicide.⁷⁷ They argued that the law would deprive them of their right to work, push the sex industry further underground, and increase their vulnerability to violence.⁷⁸ Nonetheless, the South Korean government was duly rewarded by the U.S. State Department, which ranked South Korea in “Tier 1” and, praised it for enforcing tough legislation against the sex industry, helping former sex workers to start other businesses, and sending men convicted of purchasing sex to “John School” (a slang term for a mandatory education program regarding the evils of commercial sex).⁷⁹ The TIP Reports have not mentioned the protests and hunger strikes by sex workers who opposed the law.⁸⁰ Nor does the State Department appear to be concerned by the fact that the legislation has not really implemented the “abolitionist” approach initially proposed by feminists because sex workers continue to be prosecuted in Korea.⁸¹ Indeed, there are frequent arrests, and even poor elderly women have been ordered to pay fines for violating the anti-prostitution law.⁸² There also have been constitutional challenges to the law (a case filed in 2013 was pending in the Constitutional Court of Korea as of this writing).⁸³ The U.S. TIP Report does not mention these

primarily on the ground that “the Government has done little to combat this relatively new and worsening problem of trafficking in persons.” *Id.* at 97.

⁷⁶ Kim, *supra* note 41, at 508–16.

⁷⁷ Kim, *supra* note 41, at 506.

⁷⁸ *Id.* at 506.

⁷⁹ See, e.g., U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REP. 136, 136–37 (2005), available at <http://www.state.gov/documents/organization/47255.pdf> (citing South Korea’s “sweeping” new legislation against prostitution); U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REP. 155, 155–56 (2006), available at <http://www.state.gov/g/tip/rls/tiprpt/2006/65989.htm>. For critique of the decision to place South Korea in Tier 1, see generally Ayla Weiss, *Ten Years of Fighting Trafficking: Critiquing the Trafficking in Persons Report Through the Case of South Korea*, 13 ASIAN-PAC. L. & POL’Y J. 305 (2012).

⁸⁰ For further discussion of the protests and critique of the legislation, see Seling Chang, *Korean Sex Trade ‘Victims’ Strike for Rights*, ASIA TIMES ONLINE (Dec. 22, 2004), <http://www.atimes.com/atimes/Korea/FL22Dg01.html>.

⁸¹ See Shin Park Jin-yeong, *Ten Years After the Enactment of the Anti-Prostitution Act: It’s Time to Remind Ourselves of the Spirit of the Law*, STOP! SEX TRAFFICKING KOREA (2014), <http://www.stop.or.kr/webzine12/0103.html>.

⁸² See Heo Seung, *For the Elderly, the Most Important Factor in the Choice to Engage in Prostitution Is Poverty*, HANKYOREH (May 4, 2013, 9:06 AM), http://english.hani.co.kr/arti/english_edition/e_national/585888.html.

⁸³ For a critique of the petition and a defense of the law, see Lee Na-yeong, *A Decade of the Special Act on Prostitution: Suggestions for the Further Promotion of Women’s Human Rights*, STOP! SEX TRAFFICKING KOREA (2014), <http://www.stop.or.kr/webzine12/0101.html> (last visited Feb. 25, 2015).

controversies and the criteria for assessing governments does not take into account the collateral damage that anti-prostitution laws might have on sex workers.⁸⁴

The South Korean legislation demonstrates the inherent complexity in any comprehensive law reform exercise that is inspired by a desire to obtain a higher ranking in the U.S. TIP Report. Government officials and legislators may start out by promising to treat women working in the sex industry as victims but wind up treating them as criminals, perhaps because that is how the police and other public authorities tend to view sex workers. Indeed, many governments have been accused of adopting overtly punitive approaches, which are far from the victim-assistance approaches that structural feminists would endorse. For example, in Cambodia sex workers “were rounded up and held in detention,” allegedly as part of the Cambodian government’s response to U.S. pressure to prohibit all sex work as a means of combating trafficking.⁸⁵ In 2010, it was reported that Cambodian military police were actually selling women and girls back to the brothels after their detention.⁸⁶ In other cases, governments have responded to the TIP Report by simply reducing the opportunities for migrant women workers. For example, the Japanese government imposed tougher visa requirements for migrant entertainment workers (nightclub hostesses), after the U.S. TIP Report cited migrant Filipino entertainers as a reason for giving Japan low rankings. Yet it is not at all clear that the Filipino bar hostesses were victims of trafficking, and at least one scholar concluded otherwise after conducting extensive interviews with them.⁸⁷

During the Obama administration, there have been clear shifts in the U.S. government’s approach to the annual TIP Report. For example, the State Department now places more emphasis on labor trafficking, and it assesses the problem of human trafficking in the United States as well as in foreign countries.⁸⁸ These are healthy developments. It is noteworthy, however, that the TIP Reports have continued to emphasize the need to reduce the demand for commercial sex as an important strategy for combating human trafficking.⁸⁹ Thus, any country that hopes to raise its

⁸⁴ For discussion of the general problem of collateral damage from the TIP Reports, see Gallagher, *supra* note 11.

⁸⁵ Jordan, *supra* note 12.

⁸⁶ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REP. 100–03 (2010), available at <http://www.state.gov/documents/organization/142982.pdf>.

⁸⁷ See Parreñas, *supra* note 12, at 179–80.

⁸⁸ See, e.g., U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REP. 2 (2010), available at <http://www.state.gov/documents/organization/142979.pdf>; Gallagher, *supra* note 7, at 179; Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 92 (2012).

⁸⁹ See, e.g., U.S. DEP’T OF STATE, PREVENTION: FIGHTING SEX TRAFFICKING BY CURBING DEMAND FOR PROSTITUTION (2013) (noting “the need for continued strong efforts to enact policies and promote cultural norms that disallow paying for sex”), available at <http://www.state.gov/documents/organization/211845.pdf>; U.S. DEP’T OF STATE, TRAFFICKING

ranking in the TIP Report has a clear disincentive to legalize sex work. The United States has adopted this criterion for assessment despite the fact that the Trafficking Protocol itself does not assume that sex work necessarily involves trafficking. Moreover, the language used in many of the country narratives in the TIP Reports reflects assumptions about women in the sex industry that are rarely backed up by solid research. Nor does the U.S. government make an effort to listen to the voices of sex workers from other countries regarding the legal framework that they think would best protect them from exploitation.

The remaining sections of this article thus analyze the situation of local and migrant sex workers in Hong Kong and consider the impact that the U.S. TIP Report may have on them.

IV. THE POTENTIAL IMPACT OF THE U.S. TIP REPORT ON LOCAL AND MIGRANT SEX WORKERS IN HONG KONG

The case study is divided into four sections. Section IV(A) analyzes the shifts in Hong Kong's legal treatment of sex work over the past 170 years, which provides a background for understanding the difficult policy decisions that the Hong Kong government must make when considering how to respond to recommendations in the U.S. TIP Report regarding the prevention of sex trafficking. Section IV(B) analyzes the experiences of local sex workers and their ongoing campaign for greater legal space and better protection of their rights. Section IV(C) then examines the situation of migrant sex workers in Hong Kong, the vast majority of whom come from Mainland China. In 2007, my colleagues and I published a study that concluded that the Hong Kong authorities were not adequately screening this group of sex workers for potential victims of trafficking,⁹⁰ which likely contributed to Hong Kong's demotion from Tier 1 to Tier 2 of the annual TIP Report.⁹¹ Section IV(D) thus analyzes what the Hong Kong

VICTIMS PROTECTION ACT: MINIMUM STANDARDS FOR THE ELIMINATION OF TRAFFICKING IN PERSONS (2014), available at <http://www.state.gov/j/tip/rls/tiprpt/2014/226655.htm> (last visited Jan. 20, 2015). Of course certain jurisdictions (particularly those that are considered solid allies of the U.S. such as the Netherlands, Germany, New Zealand, and parts of Australia) have received high rankings in the annual TIP Report despite the fact that they have legalized commercial sex. However, it is easy to see how those governments that have been given low rankings would rationally conclude that the best way to raise their ranking would be to follow the example of South Korea and enact a strong anti-prostitution law.

⁹⁰ See generally *infra* Section IV(C). For a full discussion of the interview data, see Emerton, Laidler & Petersen, *supra* note 53. We obtained fifty-eight valid interviews from a group of seventy-five Mainland Chinese women incarcerated in Hong Kong prisons for immigration and other offenses related to sex work.

⁹¹ Another important factor in Hong Kong's demotion is the situation of migrant domestic workers. Although Hong Kong law provides extensive protections for migrant domestic workers, certain flaws in the immigration rules and the enforcement system make this group of women vulnerable to exploitation, particularly if they rely upon an employment agency to find their employer. See generally Lee & Petersen, *supra* note 19.

government has done since publication of our study and considers why it might be reluctant to adopt some of the outstanding recommendations that the U.S. State Department has suggested are necessary in order for Hong Kong to regain its Tier 1 status in the U.S. TIP Report.

A. The History of Sex Work in Hong Kong: From Regulated Brothels to Legal Ambiguity

When the British established the colony of Hong Kong in 1842, the colonial legislature largely imported the law of England, including English common law and Acts of Parliament.⁹² However, in matters affecting family law and the status of women, British policy was not to interfere in local customs, including concubinage and the *mui tsai* system.⁹³ A *mui tsai* was a Chinese child who was sold by her parents into domestic servitude, but some were then re-sold to brothels or trafficked to households in Singapore.⁹⁴ Poverty, wars, and natural disasters in Mainland China produced “a steady supply of girls”⁹⁵ for sale, many of whom were purchased by wealthy Chinese families in Hong Kong. Social reformers lobbied against the *mui tsai* system as early as the 1870s and London also wanted it abolished.⁹⁶ The local Chinese elite resisted reforms, arguing that the system was a traditional custom and a form of social welfare, as wealthy families provided for destitute girls and found husbands for them when the period of indentured servitude ended, generally at the age of 18.⁹⁷ In practice, however, *mui tsai* were a cheap source of labor for upper-class households.⁹⁸

Researchers have frequently compared the history of the *mui tsai* to

⁹² See Peter Wesley-Smith, *The Reception of English Law in Hong Kong*, 18 H.K. L.J. 183, 183–85 (1988).

⁹³ See Carol Jones, *New Territories Inheritance Law: Colonization and the Elites*, in WOMEN IN HONG KONG 172, 172–76 (Veronica Pearson & Benjamin K.P. Leung eds., 1995); Carole J. Petersen, *Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L L. 335, 368–72 (1996) (discussing how the prohibition on female inheritance, which was derived from Chinese customary law, was finally repealed in Hong Kong in 1994).

⁹⁴ *Id.* at 463.

⁹⁵ *Id.* at 463–64.

⁹⁶ See ACW Lee & KT So, *Child Slavery in Hong Kong: Case Report and Historical Review*, 12 H.K. MED. J. 463, 464 (2006), available at http://www.hkmj.org/article_pdfs/hkm0612p463.pdf.

⁹⁷ *Id.* at 464; Maria Jaschok & Suzanne Miers, *Women in the Chinese Patriarchal System: Submission, Servitude, Escape and Collusion*, in WOMEN AND CHINESE PATRIARCHY: SUBMISSION, SERVITUDE AND ESCAPE 1, 11–12 (Maria Jaschok & Suzanne Miers eds., 1994) (containing chapters on the experiences of *mui tsai* in China, Singapore, and Hong Kong).

⁹⁸ The legislature took steps to abolish the system in 1923, but the government was slow to enforce the new laws, and the system continued to be practiced in some parts of Hong Kong until the 1950s. Jaschok & Miers, *supra* note 97, at 12.

the history of prostitution in Hong Kong.⁹⁹ While *mui tsai* were sometimes resold to brothels, there were also women in early colonial Hong Kong who identified as *ziyouan* (voluntary sex workers). Interestingly, the British social reformers were chiefly interested in rescuing the “enslaved girls” (the *mui tsai*) from the brothels and largely ignored the *ziyouan*.¹⁰⁰ The other important difference is that the *mui tsai* system was a Chinese institution that was tolerated by the colonial government.¹⁰¹ In contrast, the legal treatment of prostitution was initially modeled on British law and reflected the colonial power’s interests. Brothels were commonplace in the early days of colonial rule and licensed by the colonial government.¹⁰² Certain brothels catered to British soldiers while others served Chinese men who sought employment in Hong Kong.¹⁰³ The colonial government regularly inspected the brothels and required medical examinations to prevent the spread of sexually transmitted diseases.¹⁰⁴

In the late 1800s, Hong Kong’s system of licensed brothels began to clash with social reforms in England. By 1886, England had abolished licensed prostitution, largely due to the campaigns of the Social Purity movement and a Royal Commission Inquiry into the English Contagious Diseases Act.¹⁰⁵ A similar inquiry was held in Hong Kong, and in 1887 the local legislature dutifully repealed the ordinance requiring medical examinations.¹⁰⁶ Interestingly, however, this did not lead to the abolition of prostitution, “despite numerous instructions from London that Hong Kong was to follow England’s example.”¹⁰⁷

Instead, new legislation was enacted in 1889 requiring Hong Kong brothel owners to register with the Register of Brothels and to display, in a conspicuous place, a notice informing women that they could not be

⁹⁹ See, e.g., Angela Chin, *The Management of Women's Bodies: Regulating Mui Tsai and Prostitution in Hong Kong Under Colonial Rule 1841-1935*, 1 E-J. ON H.K. CULTURAL & SOC. STUD. 12, 14 (2002); Suzanne Miers, *Mui Tsai Through The Eyes of the Victim: Janet Lim's Story of Bondage and Escape*, in WOMEN AND CHINESE PATRIARCHY: SUBMISSION, SERVITUDE AND ESCAPE, *supra* note 97, at 108, 119.

¹⁰⁰ Chin, *supra* note 99.

¹⁰¹ See generally Carol Jones, *Women and the Law in Colonial Hong Kong*, in 25 YEARS OF SOCIAL AND ECONOMIC DEVELOPMENT IN HONG KONG (Benjamin K.P. Leung & Teresa Y.C. Wong eds., 1994).

¹⁰² Henry Lethbridge, *Prostitution in Hong Kong: A Legal and Moral Dilemma*, 8 H.K. L.J. 149, 152 (1978). A similar inspection regime in Singapore in the early days of British colonial rule. See generally James Francis Warren, *Prostitution and the Politics of Venereal Disease: Singapore, 1870-98*, 21 J. SOUTH EAST ASIAN STUD., 360-83 (1990).

¹⁰³ Lethbridge, *supra* note 102, at 153.

¹⁰⁴ *Id.*

¹⁰⁵ Jones, *supra* note 101, at 123-24.

¹⁰⁶ *Id.* at 124; Lethbridge, *supra* note 102, at 153-54.

¹⁰⁷ Jones, *supra* note 101, at 124-25.

detained against their will.¹⁰⁸ Certain government officers (including the Colonial Surgeon) had a statutory right to enter and inspect the brothels.¹⁰⁹ In essence, this was a covert attempt to reintroduce the system of compulsory medical examinations and perpetuate a system of regulated prostitution, despite its abolition in England.¹¹⁰ Colonial officials argued that abolishing prostitution would antagonize the local Chinese elite, although opinion was divided on the issue (just as it was on the *mui tsai* system).¹¹¹ Hong Kong thus managed to keep the basic system of licensed brothels intact in Hong Kong until the 1930s. A 1921 census reported 249 brothel keepers (all women) employing 2,700 prostitutes.¹¹²

In the end it was international pressure that finally forced Hong Kong to change its policy. In the 1920s, the League of Nations began to dispatch commissions of inquiry to investigate trafficking of women and girls (which was referred to at that time as the “white slave trade”). A commission visited Hong Kong and expressed its strong disapproval of the brothels, and the colonial government finally agreed to phase them out. Brothels serving Europeans closed between 1931 and 1932, and the last brothels serving Chinese clients closed in 1934.¹¹³ Although the Japanese reinstated licensed prostitution during the occupation of Hong Kong (from late 1941 to 1945), these brothels quickly disappeared or went underground after the British regained control in 1945.¹¹⁴ As explained in the next two sections however, commercial sex did not disappear from Hong Kong.

B. Local Sex Workers in Modern Hong Kong and the Development of Rights-Based Advocacy

Although the Crimes Ordinance now prohibits brothels and many activities associated with sex work, there is no law prohibiting a resident of Hong Kong from engaging in sex work in her own home, in a situation commonly referred to in Cantonese as *yeit lao yeit fong* (which loosely translates to “one-woman brothel” in English¹¹⁵). This limited state of decriminalization prevailed in the late colonial period and continued after 1997, when Hong Kong became a Special Administrative Region of China

¹⁰⁸ Lethbridge, *supra* note 102, at 154 (citing the Protection of Women and Girls Ordinance, No. 19 (1889)).

¹⁰⁹ *Id.*, at 154.

¹¹⁰ *Id.* (citing the Protection of Women and Girls Amendment Ordinance, No. 31 (1899)).

¹¹¹ Jones, *supra* note 101, at 124–26.

¹¹² Lethbridge, *supra* note 102, at 155.

¹¹³ *Id.* at 156.

¹¹⁴ *Id.*

¹¹⁵ See Laidler, Petersen, & Emerton, *supra* note 52. See also, *The Sex Trade Industry in Hong Kong: A Call for Activism and Transformation*, ZI TENG (noting that the phrase “yeit lao yeit fong” is understood in Hong Kong to refer to a situation in which a woman conducts sex work alone in an apartment), http://www.ziteng.org.hk/platform/pfc03_e.html (last visited Feb. 24, 2015).

under the “one country, two systems” model.¹¹⁶

Many of the activities associated with sex work are, however, prohibited in Hong Kong, including: soliciting for an immoral purpose,¹¹⁷ putting up public signs advertising prostitution,¹¹⁸ and running a vice establishment.¹¹⁹ From the government’s point of view, these criminal offenses help to reduce the involvement of organized crime and also the visibility of sex work, striking a “reasonable balance” between the rights of sex workers and the prevailing moral values.¹²⁰ In practice, however, these criminal offences are often used to harass sex workers. This is partly because the term “vice establishment” is defined very broadly, so as to include the use of premises “wholly or mainly” by two or more persons for the purpose of prostitution.¹²¹ Thus, two sex workers sharing an apartment can be convicted of running a vice establishment and become liable for imprisonment of up to ten years. An individual sex worker also may not legally employ a security guard because that person would be guilty of the offense of knowingly living “wholly or in part on the earnings of prostitution of another.”¹²² This makes the job of a sex worker unnecessarily dangerous, as she cannot legally have co-workers or assistants on the premises. Although Hong Kong is generally quite safe for a city of its size, sex workers are particularly vulnerable to attack when they work alone in one-woman brothels.¹²³

Sex workers also complain of police harassment, even when they are careful not to violate the law. A survey conducted by a nongovernmental organization concluded that sex workers are regularly subjected to verbal abuse, noting that the police “scolded them and forced them to leave the streets, even when the women were only standing on the streets or simply passing by, without any intention of soliciting.”¹²⁴ Another study of police methods (based upon field observations and interviews with police officers)

¹¹⁶ Under the “one country, two systems model,” Hong Kong maintains its pre-existing common legal system and enacts its own legislation; the criminal law of Mainland China does not apply in the territory. For in-depth analysis of the “one country, two systems” model, see generally GHAI, *supra* note 13.

¹¹⁷ Crimes Ordinance, (2012) Cap. 200, BLIS, § 147 (H.K.).

¹¹⁸ *See id.* § 147A.

¹¹⁹ *See id.* § 139.

¹²⁰ SEC. BUREAU, H.K. POLICE FORCE, POLICY AND MEASURES FOR ENHANCING THE SAFETY OF SEX WORKERS, LC Paper No. CB(2)1742/07-08(01) (2008) (paper prepared for May 5, 2008 discussion by the Legislative Council’s Panel on Security), *available at* <http://www.legco.gov.hk/yr07-08/english/panels/se/papers/se0505cb2-1742-1-e.pdf>.

¹²¹ Crimes Ordinance, *supra* note 117, § 117(3).

¹²² *Id.* § 137.

¹²³ *See* Deena Guzder, *Hong Kong Alarmed Over Sex-Worker Murders*, TIME (Feb. 10, 2009), <http://www.time.com/time/world/article/0,8599,1878395,00.html>.

¹²⁴ ACTION FOR REACH OUT, A SURVEY ON HONG KONG POLICE’S ATTITUDES TOWARDS FEMALE SEX WORKERS (SURVEY REPORT) 9 (2005).

concluded that the Hong Kong police have developed informal strategies to discourage sex work.¹²⁵ For example, police will question a sex worker's landlord about her activities, hoping that she will be asked to move out of the building. The police know that they cannot enter and search a private apartment without a warrant, but they find excuses to knock on the doors of sex workers, hoping to frighten clients. As one officer reported, "we can knock on the door to make an enquiry about the crime situation in the neighborhood or remind her to be cautious when a stranger visits her apartment . . . Sooner or later she will move out because we are targeting her."¹²⁶ The criminal offences associated with sex work also give the police an excuse to undertake elaborate undercover operations. For example, if an officer pretends to be a client and finds two sex workers working in the same apartment, he can charge them with running a vice establishment and charge their landlord with letting premises for use as a vice establishment.¹²⁷ Once under arrest, sex workers are subjected to humiliating body searches at the police station and feel pressured to confess to illegal acts.¹²⁸

In 2000 to 2001, criminologist Travis S.K. Kong partnered with a sex worker advocacy group to conduct a large-scale study of sex workers' experiences in Hong Kong.¹²⁹ Most respondents reported negative feelings regarding their profession, but these feelings generally did not arise from the nature of their work. Rather, respondents complained about legal constraints, harassment from the police, abuse by some clients, and the stigma of working in an industry that is only barely legal.¹³⁰ Kong described the respondents as performing a skilled emotional labor and explained how they coped with social stigma, police surveillance, and the inherent dangers of their workplaces.¹³¹

In recent years, however, sex worker organizations and their supporters have become increasingly visible, using rights-based arguments to challenge Hong Kong's laws and policies. Action for REACH OUT (Rights of Entertainers in Asia to Combat Human Oppression and Unjust Treatment) was established as a nongovernmental charitable organization in

¹²⁵ Yiu Kong Chu & Carlie C.Y. Chan, *Policing One-woman Brothels in Hong Kong: Alternative Strategies*, 5 J. ASIAN ASS'N POLICE STUD. 3 (2007).

¹²⁶ *Id.* at 16.

¹²⁷ See Crimes Ordinance, *supra* note 117, § 117 (3).

¹²⁸ See *March on the International Day to End Violence Against Sex Workers 2007*, ZI TENG, http://www.ziteng.org.hk/events/2007DEC18_e.php (last visited June 1, 2014). For additional information regarding Zi Teng and its advocacy work, see *About Us*, ZI TENG, http://www.ziteng.org.hk/aboutus/aboutus_e.html (last visited June 1, 2014).

¹²⁹ See TRAVIS S.K. KONG & ZI TENG, A RESEARCH REPORT ON THE WORKING EXPERIENCES OF HONG KONG'S FEMALE SEX WORKERS (2003).

¹³⁰ *Id.*, at ii (Executive Summary).

¹³¹ See Travis S.K. Kong, *What it Feels Like for a Whore: The Body Politics of Women Performing Erotic Labour in Hong Kong*, 13 GENDER, WORK & ORG. 409, 413-43 (2006).

1993 to offer services and support to women working in the sex industry. This group has become increasingly vocal in lobbying for repeal of Hong Kong's criminal offenses related to sex work so that women will not have to work alone in one-woman brothels in order to avoid arrest.¹³²

Another prominent organization is Zi Teng, which gained significant public support during its campaign against undercover agents who were receiving sexual services under false pretenses. In 2006, Zi Teng retained Simon Young, a law professor at the University of Hong Kong. Professor Young produced a detailed written opinion for Zi Teng, which concluded that the practice of receiving sexual services during undercover operations was unethical except in rare circumstances¹³³ (such as when an undercover officer risks losing his cover and suffering injury if he declines an offer of sexual services¹³⁴). Professor Young studied police codes of conduct around the world, and concluded that Hong Kong's policy fell well below the general standards of ethical conduct.¹³⁵ The Legislative Council's Security Panel then held hearings and asked the government to justify the practice.¹³⁶ Although the government claimed that there was sometimes a "strong operational need" for the undercover officer to receive sexual services in order to maintain his cover and obtain evidence, it could not answer legislators' questions regarding the frequency with which sexual services were being received.¹³⁷ Officials conceded, however, that agents often made more than one visit to a "massage establishment" and might receive sexual services on more than one occasion.¹³⁸ While the police apparently viewed this as a legitimate way to gather evidence against those who are unlawfully operating vice establishments, the women who were tricked into providing these services viewed it as clear abuse.

In addition to seeking support from the local legislature, Zi Teng and Action for REACH OUT regularly submit alternative reports (also known

¹³² See ACTION FOR REACH OUT, ANNUAL REPORT 2007/2008 2, 8 (2008).

¹³³ Memorandum from Simon Young to Elaine Lam of Zi Teng on the Legal Implications of Police Conduct During Undercover Operations for Vice Activities, First Submission (Apr. 3, 2006) [hereinafter *Young First Submission*], available at <http://www.hku.hk/ccpl/pub/submissions/index.html>.

¹³⁴ Memorandum from Simon Young to Elaine Lam of Zi Teng on the Legal Implications of Police Conduct During Undercover Operations for Vice Activities, Second Submission (Sept. 25, 2006) [hereinafter *Young Second Submission*], available at <http://www.hku.hk/ccpl/pub/submissions/index.html>.

¹³⁵ *Young Second Submission*, *supra* note 134, at 4–6.

¹³⁶ SECURITY BUREAU, SUPPLEMENTARY INFORMATION ON POLICE'S UNDERCOVER OPERATIONS AGAINST VICE ACTIVITIES, LC Paper No. CB(2)3021/05-06(01) (2006) (paper prepared for the Legislative Council Panel on Security), available at <http://www.legco.gov.hk/yr05-06/english/panels/se/papers/se0404cb2-3021-1-e.pdf>.

¹³⁷ *Id.* at 1–3, 5 (noting the numbers of persons arrested, charged, and convicted with keeping a vice establishment in 2005 but that "we do not maintain statistics on cases involving a complete course of masturbation").

¹³⁸ *Id.* ¶ 4 (b)–(c).

as “shadow reports”) to the international treaty bodies that monitor Hong Kong’s compliance with human rights treaties, a strategy that is regularly employed by women’s and human rights organizations in Hong Kong.¹³⁹ For example, Zi Teng submitted an alternative report in 2006 when Hong Kong was reviewed by the Committee on the Elimination of Discrimination Against Women and in 2008 when Hong Kong was reviewed by the Committee Against Torture.¹⁴⁰ Zi Teng’s lengthy alternative report accused the police of receiving sexual services well beyond the extent admitted by the Security Bureau in its report to the Legislative Council.¹⁴¹ Other NGOs also featured sex worker issues in their alternative reports to the Committee Against Torture, and the Human Rights Monitor discussed the mistreatment of sex workers in great detail in its report.¹⁴² Sex workers were also highlighted (as one of several minority groups who are vulnerable to police abuse) in the reports of the Civil Human Rights Front, the Hong Kong Human Rights Commission, and Society for Community Organization.¹⁴³

The Committee Against Torture took note of the NGO reports on police harassment of sex workers and requested the Hong Kong government to supplement its official report with additional information regarding the treatment of sex workers during undercover operations and interrogations, including the allegations of strip searches and the reported receiving of free sexual services by the police.¹⁴⁴ The Hong Kong government responded at length, informing the Committee that it had

¹³⁹ See generally Carole J. Petersen, *Preserving Traditions or Breaking the Mold? A Comparative Study of the Impact of Transnational Human Rights Processes in the People’s Republic of China and the Hong Kong Special Administrative Region*, in TRANSNATIONAL LEGAL PROCESSES AND HUMAN RIGHTS (Kyriaki Topidi & Lauren Fielder, eds., 2013).

¹⁴⁰ ZI TENG, ALTERNATIVE REPORT TO U.N. COMMITTEE AGAINST TORTURE, available at <http://www2.ohchr.org/english/bodies/cat/docs/ngos/ZiTengHongKong41.pdf>.

¹⁴¹ *Id.* at 3 (noting that a judge had criticized one officer for receiving sexual services twelve times before arresting a particular sex worker).

¹⁴² See H.K. HUM. RTS. MONITOR, SHADOW REPORT FOR THE U.N. COMMITTEE AGAINST TORTURE ON THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN THE H.K. SPECIAL ADMIN. REGION, THE PEOPLE’S REPUBLIC OF CHINA, at 44-60 (2008), available at <http://www2.ohchr.org/english/bodies/cat/docs/ngos/HRMHongKong41.pdf>.

¹⁴³ See H.K. HUMAN RIGHTS COMM’N & SOC’Y FOR CMTY. ORG., REPORT TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE ON THE SECOND REPORT BY H.K. SPECIAL ADMIN. REGION UNDER ARTICLE 19 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, ¶ 26 (2008), available at http://www2.ohchr.org/english/bodies/cat/docs/ngos/uncat_apr2008_CH_41.pdf; see also CIVIL HUMAN RIGHTS FRONT, 1 (2008), available at <http://www2.ohchr.org/english/bodies/cat/docs/ngos/CHRFHongKong41.pdf>.

¹⁴⁴ Written replies by the Hong Kong Special Administrative Region to the list of issues (CAT/CHKG/Q/4) to be taken up in connection with the consideration of the fourth periodic report of HONG KONG addressed to the Committee Against Torture (CAT/CHKG/4), ¶¶ 133-39, U.N. Doc. CAT/CHKG/Q/4/Add.1 (Sept. 26, 2008) [hereinafter Written Replies of Hong Kong to CAT], available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fHKG%2fQ%2f4%2fAdd.1&Lang=en.

revised its internal guidelines for anti-vice operations, so that supervisors exercise more vigorous control over the scope and extent of the evidence to be gathered.¹⁴⁵ Similar assurances have been made to the Legislative Council.¹⁴⁶ As these changes were not made until after Zi Teng and Professor Young made their submissions, it appears that the legislative investigation, as well as pressure from international human rights bodies, inspired the government to tighten its internal guidelines. The government has also developed new guidelines on searching sex workers and other people held in detention. Although strip searches and “body cavity” searches still occur, there is an effort to conduct them with greater sensitivity and care than in the past.¹⁴⁷

In November 2008, the Committee Against Torture issued its Concluding Observations on the Hong Kong Special Administration and included two sections that are particularly relevant to sex workers. With regard to invasive body searches, the Committee welcomed the new guidelines for police but expressed concern that the Hong Kong Police Commissioner had, nonetheless, decided to make body searches automatic for all individuals in police custody, regardless of whether there was any objective justification for it.¹⁴⁸ The Committee also expressed concern regarding the allegations of police abuse during “operations in the context of prostitution-related offences.”¹⁴⁹

The Committee did not specifically mention the policy of allowing officers to receive free sexual services during certain undercover operations. This was somewhat surprising, given the space devoted to the issue in the alternative reports of Zi Teng and Human Rights Monitor. The Hong Kong Legislative Council, however, has asked the government to start recording the number of cases in which the police receive sexual services, and it appears that it is now less common for an officer to be given permission to do so.¹⁵⁰ Thus, while the Hong Kong government has not completely

¹⁴⁵ *Id.* ¶ 135.

¹⁴⁶ Letter from Security Bureau to Raymond Lam, Clerk to the Legislative Council’s Panel on Security, on Follow up to Panel Meeting held on 27 October 2008 to Raymond Lam, Clerk to the Legislative Council’s Panel on Security, (Dec. 8, 2008) (on file with the author), *available at* http://www.legco.gov.hk/yr08-09/english/panels/se/se_psw/papers/se_psw1209cb2-417-2-e.pdf.

¹⁴⁷ Written Replies of Hong Kong to CAT, *supra* note 144, ¶¶ 124–28. For further details of the improvements made to protect the rights of persons who are arrested in Hong Kong, see Hong Kong’s Fifth periodic report to the Committee Against Torture (submitted on June 20 2013), ¶¶ 11.9–11.11, *available at* http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=HKG&Lang=en.

¹⁴⁸ Hong Kong’s Fifth periodic report to the Committee Against Torture, *supra* note 147, ¶ 10.

¹⁴⁹ *Id.* ¶ 13.3.

¹⁵⁰ For example, in one three-month period, the government reported that one undercover officer received permission in one case to receive sexual services as part of an undercover operation. *See* Sec. Bureau & H.K. Police Force Legislative Council Panel on Security- Subcommittee on Police’s

backed down from its position on undercover operations, Zi Teng's rights-based advocacy appears to have had a positive impact on the treatment of sex workers by the police. This provides an interesting contrast between the reporting process for international human rights treaties (in which sex worker groups can and do participate) and the process by which the annual U.S. TIP Report is generated, which systematically ignores the rights and opinions of local sex workers.

Of course, guidelines and monitoring are not the same as law reform, and the policy changes announced by the Hong Kong government, thus far, fall well short of what Zi Teng, Action for REACH OUT, and other supporting organizations are seeking. The criminal offences associated with sex work still give the police an excuse to harass and arrest them. Sex worker groups are, therefore, lobbying for full (or at least greater) legalization of sex work, which would give the police fewer excuses to entrap, detain, search, and prosecute sex workers. They are increasingly focusing on the need to amend the definition of "vice establishment" so that sex workers can work together for greater safety. This argument gained strength in recent years because of a spat of violent attacks on sex workers.¹⁵¹ For example, in July 2009, a man was convicted of three consecutive murders of sex workers, all in one-woman brothels.¹⁵² The trials generated support for sex workers in the press and Action for REACH OUT intensified its campaign for law reform, either full legalization or at least an amendment to the definition of "vice establishment" to allow two sex workers to work together on the same premises.¹⁵³ In early 2014, a large coalition of academic groups and NGOs submitted an alternative report on Hong Kong's compliance with the Convention on the Elimination of All Forms of Discrimination Against Women,¹⁵⁴ which recommended, "The legal definition of 'vice establishment' should be reviewed to equally protect sex workers' lives and personal safety. Relevant legislative reform should be introduced to allow at least two sex workers to co-work in a single

Handling of Sex Workers and Searches of Detainees, Information on Anti-Vice Operation Conducted by Law Enforcement Agencies in Overseas Jurisdictions (Mar. 2009).

¹⁵¹ See Guzder, *supra* note 123.

¹⁵² See Yvonne Tsui & Martin Wong, *Murderer of 3 Prostitutes Jailed for Life*, S. CHINA MORNING POST (July 29, 2009, 12:00 AM), <http://www.scmp.com/article/688248/murderer-3-prostitutes-jailed-life>.

¹⁵³ See 21 Questions about Sex Work, ACTION FOR REACH OUT, http://www.afro.org.hk/EN/info_21questions.php (last visited June 1, 2014).

¹⁵⁴ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 193 (Sept. 3 1981) [hereinafter CEDAW], available at <http://www.un.org/womenwatch/daw/cedaw/>. Hong Kong has been bound by the CEDAW since 1996, and women's organizations have been very active in the international reporting process. See Carole J. Petersen & Harriet Samuels, *The International Convention on the Elimination of All Forms of Discrimination Against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organizations in the United Kingdom and Hong Kong*, 26 HASTINGS INT'L & COMP. L. REV. 1, 1-50 (2002).

premise for mutual support.”¹⁵⁵ The CEDAW Committee¹⁵⁶ responded to this alternative report by directly raising the issue of sex workers’ safety in the “list of issues” for its next review of Hong Kong’s compliance with the treaty, which was held in the last quarter of 2014. The Committee noted that it had received “reports that women in prostitution in Hong Kong are forced to work alone in isolated settings where they are exposed to higher risk of abuse, exploitation and even life-threatening violence at the hands of the clients,” and it asked the government to describe “what measures have been taken to ensure greater protection of sex workers.”¹⁵⁷ When the Hong Kong government responded rather weakly (by suggesting that individual sex workers could install alarms for emergency situations), the Committee repeated its concern and recommended, in its Concluding Observations, that Hong Kong amend the law relating to “vice establishments” so that sex workers can work together on the same premises without violating the law.¹⁵⁸ This recommendation is potentially important for organizations that lobby for the rights of sex workers, as the CEDAW Committee’s Concluding Observations have been influential in previous law and policy reforms in Hong Kong.¹⁵⁹

Of course, structural feminists would argue that the Hong Kong

¹⁵⁵ H. K. WOMEN’S COAL. ON EQUAL OPPORTUNITIES, SUBMISSION TO CEDAW PRE-SESSIONAL WORKING GROUP ON THE IMPLEMENTATION OF CEDAW IN HONG KONG, § IA (2014) (comprising Action for REACH OUT and eleven other organizations), *available at* http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CHN/INT_CEDAW_NGO_CHN_18386_E.pdf.

¹⁵⁶ The Committee on the Elimination of Discrimination Against Women is the treaty-monitoring body for CEDAW. For information on the CEDAW Committee, see <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>.

¹⁵⁷ Comm. on the Elimination of Discrimination Against Women, List of issues and questions in relation to the combined seventh and eighth periodic reports of China, ¶ 11, U.N. Doc. C/CHN/Q/7-8, (March 10, 2014), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCHN%2fQ%2f7-8&Lang=en. The CEDAW Committee also asked the government to provide information on “provisions that are available for rehabilitation and reintegration of women in prostitution into society, especially by enhancing other livelihood opportunities.” *Id.*

¹⁵⁸ See Comm. on the Elimination of Discrimination Against Women, List of issues and questions in relation to the combined seventh and eighth periodic reports of China, Addendum: Replies of China, 29, U.N. Doc. C/CHN/Q/7-8/Add.1 (Aug. 15, 2014), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCHN%2fQ%2f7-8%2fAdd.1&Lang=en; and Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the combined seventh and eighth periodic reports of China (including Hong Kong), ¶ 56 and 57(e), U.N. Doc. C/CHN/CO/7-8 (Nov. 15, 2014), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCHN%2fCO%2f7-8&Lang=en. The Committee also recommended that the government offer “exit programs” to sex workers who wished to leave prostitution.

¹⁵⁹ Petersen & Samuels, *supra* note 154, at 36-41 (analyzing previous law and policy reforms undertaken by the Hong Kong government in response to the CEDAW Committee’s Concluding Observations).

government's greatest sin is its toleration of the sex industry and that the only way to remedy the inherent violence of commercial sex is to abolish it.¹⁶⁰ Structural feminists would likely support repeal of the offences related to the selling of sexual services by individual women (because they view "prostituted women" as victims), but they would simultaneously request the government to criminalize the buying of sexual services and to enthusiastically prosecute customers of sex workers. Clearly groups like Zi Teng would not support this option. But such a proposal might receive support from members of the general public who disapprove of sex workers and would like to eradicate the sex industry on aesthetic or moral grounds. Thus, sex worker organizations must be careful not to request that the government initiate a broad law reform process unless they are confident that it will not backfire. Seeking incremental law reform (such as allowing two sex workers to legally work on the same premises) is probably the more cautious strategy.

In this context, however, it should be recognized that the annual U.S. TIP Report could easily undermine any campaign for even modest law reform to make Hong Kong sex workers safer. This is because the criteria set by the U.S. State Department includes "making a serious and sustained" effort to reduce the demand for commercial sex acts, which would probably not be consistent with any legislation that reduces existing restrictions on the sex industry.¹⁶¹ The Hong Kong government has already been embarrassed by the fact that it was lowered from Tier 1 to Tier 2 in 2009, and it claims to have been working hard to raise itself back to Tier 1. The last thing that the government would want to do is to support a law reform effort that might be perceived as widening the legal space for the commercial sex industry, even if it has the effect of making Hong Kong sex workers safer. This illustrates one of the key problems with the U.S. TIP Report—it ignores the voices and the immediate needs of local sex workers in the countries that are being reviewed.

The next section of this article discusses Hong Kong's legal framework concerning trafficking and the experiences of migrant sex workers in Hong Kong, the vast majority of whom come from Mainland China and are in a far more vulnerable position than local sex workers.

C. Migrant Sex Workers and the Need to Screen for Victims of Trafficking

In contrast to the state of "partial decriminalization" for local sex workers, Hong Kong law prohibits anyone who is not a resident of Hong

¹⁶⁰ See generally MacKinnon, *supra* note 32.

¹⁶¹ See, e.g., TRAFFICKING VICTIMS PROTECTION ACT: MINIMUM STANDARDS FOR THE ELIMINATION OF TRAFFICKING IN PERSONS, *supra* note 89, ¶ 12.

Kong from conducting sex work in the territory.¹⁶² Hong Kong authorities regularly conduct raids on illegal “vice establishments” and arrest and prosecute thousands of migrant women every year for immigration offences arising from sex work (including breaching the “conditions of stay” in their tourist visas, using forged or altered documents, or “making a false statement to an immigration officer”).¹⁶³ From the period of 2005 to 2007, approximately 12,000 Mainland Chinese women were admitted to Hong Kong prisons, representing about half of Hong Kong’s female prison population.¹⁶⁴ The high rate of imprisonment of migrants found working illegally is a deliberate strategy, adopted by the Hong Kong government to discourage Mainland Chinese from coming to Hong Kong to work in the sex industry.¹⁶⁵

Given the large number of women who are regularly detained in the course of raids on illegal brothels, one might expect to see Hong Kong report a significant number of cases of sex trafficking. Yet Hong Kong has always reported a fairly small number of trafficking cases. This is particularly surprising because of the legal framework, which appears to take (at least on paper) a very dim view of anyone who facilitates cross-border movement of women into the sex industry. For example, Section 129 of the Crimes Ordinance provides:

- (1) A person who takes part in bringing another person into, or taking another person out of, Hong Kong for the purpose of prostitution shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.
- (2) It shall not be a defence to a charge under this section to prove that the other person consented to being brought into or taken out of Hong Kong whether or not she or he knew it was for the purpose of prostitution or that she or he received any advantage therefor.¹⁶⁶

¹⁶² A nonresident needs a visa to work legally in Hong Kong, and work visas are never issued for sex work.

¹⁶³ Immigration Ordinance (1997), Cap. 115, BLIS, §§ 41–2 (H.K.). For a detailed study of the offenses convictions and range of sentences, see generally Laidler, Petersen, & Emerton, *supra*, note 52.

¹⁶⁴ Written Replies of Hong Kong to CAT, *supra* note 144, ¶¶ 108–09 (providing this data in response to a question from the U.N. Committee Against Torture as to why the female imprisonment rate in Hong Kong is so high).

¹⁶⁵ For further discussion and a critique of the government’s tough policies towards migrant sex workers, see Laidler, Petersen & Emerton, *supra* note 52, at 80–81. It should be noted that the female prison population in Hong Kong did decrease from 2005 to 2007, which may indicate that the tough sentencing discouraged some migrant sex workers from coming to Hong Kong. *Id.*

¹⁶⁶ Crimes Ordinance, *supra* note 117, § 129.

Thus, in the area of cross-border trafficking for the purposes of prostitution, the criminal offense is defined quite broadly in Hong Kong—more broadly than is required under the Trafficking Protocol.¹⁶⁷ At first reading, this provision might be interpreted as expressing a legislative intent to take an abolitionist or prohibitionist approach to sex work—at least when migrant sex workers are brought to Hong Kong by third parties. Yet despite this provision, in practice the Hong Kong government does not apply an abolitionist approach to migrant sex workers, and it identifies only a few cases of sex trafficking each year.¹⁶⁸ This is not to suggest that the authorities ignore the third parties who run illegal vice activities. Men are arrested during raids,¹⁶⁹ and they can be prosecuted for a range of offenses, including running a vice establishment¹⁷⁰ and knowingly living “wholly or in part on the earnings of prostitution of another.”¹⁷¹ However, the small number of prosecutions for “trafficking” is one of the key concerns that has been raised regarding Hong Kong’s commitment to preventing trafficking for sexual exploitation, and it thus deserves careful analysis.

In 2005 to 2006, my colleagues and I gained some initial insight into Hong Kong’s approach to this issue by surveying a random sample of migrant women, all of whom had been convicted of immigration offenses related to sex work.¹⁷² While one of our purposes was to ascertain how the Hong Kong criminal justice system treated these women,¹⁷³ an additional

¹⁶⁷ While the Trafficking Protocol also provides that the consent of the victim to exploitation is irrelevant, this is limited to situations in which a person has been trafficked by certain means (e.g. force, coercion, deception, abuse of power or abuse of a position of vulnerability). Trafficking Protocol, *supra* note 5.

¹⁶⁸ Legis. Council Panel on Const. Aff., *Hearing of the United Nations Human Rights Committee on the Third Report of the Hong Kong Special Administrative Region in the light of the International Covenant on Civil and Political Rights*, App. III (May 2013), available at <http://www.cmab.gov.hk/upload/LegCoPaper/ca0520cb2-1117-1-e.pdf>. See also Written Replies of Hong Kong to CAT, *supra* note 144, ¶ 69, n. 9 (explaining that there was only one trafficking case in 2007 and that two other suspected cases eventually were not classified as trafficking because the investigation revealed that the women had come to Hong Kong to conduct sex work voluntarily, without any force, coercion, or fraud).

¹⁶⁹ See Paggie Leung, *Police Arrest 241 People During Anti-vice Crackdown*, S. CHINA MORNING POST (Nov. 4, 2004, 12:00 AM), <http://www.scmp.com/article/476728/police-arrest-241-people-during-anti-vice-crackdown> (reporting that 204 women and 37 men were arrested in a coordinated anti-vice operation that involved raids on many different premises).

¹⁷⁰ Crimes Ordinance, *supra* note 117, § 117(3).

¹⁷¹ *Id.* § 137.

¹⁷² The Department of Correctional Services gave permission for the interviews in prison, which allowed us to access women who had worked under third-party management, a group that is traditionally difficult to study because they are hidden away in illegal brothels. Using an interpreter, we interviewed seventy-five women for approximately one hour and obtained fifty-eight valid interviews. Funding for the study was provided by a grant from the University Grants Council, University of Hong Kong.

¹⁷³ Previously, migrant women who were convicted of minor immigration offenses as a result of their engagement in sex work were typically given a suspended sentence and sent home. By the

research question was whether potential victims of trafficking were being overlooked by the Hong Kong authorities.¹⁷⁴ The interviewees were asked about their age, hometown in China, work experience before coming to Hong Kong, and motivations for coming to Hong Kong. They were also asked whether a third party had facilitated their travel to Hong Kong and their entry into sex work, whether they had worked under third-party management, and whether they had been deceived, coerced, or mistreated by any third parties.

The majority of these women (forty-six of our fifty-eight interviewees) readily admitted that they had come to Hong Kong to engage in sex work. Indeed, some told us that they had already made previous trips to Hong Kong to conduct sex work, had previously avoided detection, and had returned safely to the Mainland after a period of weeks with substantial profits.¹⁷⁵ Their reasons for working illegally in Hong Kong were fairly simple—they had low-paying jobs in Mainland China and needed more money to meet their financial needs or to address a recent crisis, such as the unemployment or illness of a family member. Although some of these women made their own visa and travel arrangements (especially those who had undertaken more than one trip to Hong Kong), most were initially recruited by a third party (generally an acquaintance) who had offered to organize their visa, travel, and working arrangements in Hong Kong.¹⁷⁶ The women knew that they would be doing sex work and would need to reimburse the “middlemen” before keeping any profits for themselves. From the point of view of the Hong Kong authorities, these women would not be “victims” because they had voluntarily travelled to Hong Kong with the intention of conducting sex work and had done so, in violation of the law. We also did not classify these women as victims of trafficking under international law, as they did not allege that they were deceived or coerced into sex work.¹⁷⁷

In contrast, however, we concluded that twelve of the fifty-eight women in our study (21%) should have been considered victims of trafficking if their stories could be confirmed. These women described how they had been lured to Hong Kong by false promises of jobs outside the sex

time we conducted our study, however, the Hong Kong government had adopted harsher policies, including sentencing women to prison and a blacklist system for women deported for suspected involvement in sex work, and we wanted to assess the impact of these policy decisions. *See generally* Laidler, Petersen & Emerton, *supra* note 52, at 71.

¹⁷⁴ The interviews are briefly summarized here; for a more detailed discussion of the results, see generally Emerton, Laidler & Petersen, *supra* note 53, at 42-50.

¹⁷⁵ For example, one woman claimed that she had earned the equivalent of \$10,000 USD on a previous visit to Hong Kong.

¹⁷⁶ See Emerton, Laidler & Petersen, *supra* note 53, at 42-50.

¹⁷⁷ It should be noted that some women in this category felt that they had been misled at some stage regarding the legality of sex work in Hong Kong, but the authorities probably would not consider this relevant because it is illegal for a migrant to do any work in Hong Kong without a legitimate work visa, and this fact is well publicized at the border.

industry (such as dishwashing, cleaning, foot massage, or hairdressing jobs). It was not until their arrival that they were taken to a brothel or other vice establishment, where the middleman, boss, or *mamasan* informed them that they were expected to do sex work. These young women were told that they could make a great deal of money if they cooperated but that they could not return to the Mainland until they serviced enough clients to at least pay back the visa and travel fees.

While a few of the women in this group told us that they agreed to do sex work fairly quickly, others said that they resisted for several days and were subjected to a variety of pressures (e.g. they were locked up in a room, threatened, or denied food). Five of these women said that they felt they were ultimately forced into sex work. In some cases, the interviewees were arrested in circumstances that should have alerted the authorities to the possibility of trafficking. For example, one woman told us that when the police conducted the raid on the brothel, they found her in a room that had been locked from the outside—but they nonetheless arrested and prosecuted her. Another interviewee (who claimed to be only fifteen years of age at the time of her arrest) told us that she was so miserable after serving the first client that the minders allowed her to leave the brothel. The doorman of the building told her how to get back to the border between Hong Kong and Mainland China, where she was promptly arrested for possession of a forged travel document. Despite her youth, the Hong Kong authorities prosecuted her for immigration offenses.

We had no way of confirming the truth of the stories told to us by the twelve women who we classified as victims of trafficking. It is, however, worth noting that these women were already serving their sentences and the interviewer made it clear that the results would have no impact on individual cases; thus they did not have any obvious incentive to lie.¹⁷⁸

While it may seem surprising that none of these twelve women were identified as potential victims of trafficking by the Hong Kong authorities, it was understandable given Hong Kong's legal and policy framework at the time. First, although the offense of trafficking for sexual exploitation is drafted quite broadly, Hong Kong does not have a similarly broad definition of "trafficking victim," and this concept has never been defined in Hong Kong legislation. There is also no specific statute providing victims of trafficking with rights to protection or assistance. As a matter of policy, if a migrant woman escapes or is rescued from an obvious situation of forced prostitution, the government's policy is not to charge her with any offenses committed as a direct result of being trafficked.¹⁷⁹ The Hong Kong authorities will also grant immunity from prosecution to women who agree

¹⁷⁸ We also discarded interview results if the answers revealed inconsistencies, which is why we ultimately had only fifty-eight valid interviews out of a total of seventy-five.

¹⁷⁹ See, e.g., U.S. DEP'T OF STATE, *supra* note 86, at 167–68 (listing Hong Kong as Tier 2 in 2010).

to act as witnesses against their traffickers. However, this has all been a matter of policy, leaving the government with a great deal of discretion.

Moreover, given the large number of migrant women who were being arrested and processed at the time of our study—in a system that my colleagues and I informally dubbed the “migrant sex worker conveyor belt”—it was easy to see how victims of trafficking could be overlooked by the authorities. Virtually all of our fifty-eight interviewees (both the trafficked and non-trafficked women) described a very hurried and standardized procedure after their arrest. They were all taken to the police station, provided with an interpreter if they needed one (because many did not speak Cantonese, the local language in Hong Kong), quickly interviewed, and then asked to sign a statement. None of our interviewees recalled being asked whether they experienced any deception or coercion in the process of being recruited for sex work. Nor were they encouraged to tell the full story of how they were recruited in China, how they arrived in Hong Kong, or how they wound up working in the sex industry. Indeed, one interviewee insisted that she was never even interviewed by the police but rather asked to sign a pre-prepared statement admitting that she was present in the vice establishment when she was arrested. Thus, at the time of our study, the Hong Kong police were not even asking questions that might elicit stories of being trafficked.

It also appeared that at least some authorities may have actively discouraged women from telling personal stories that would compel the police to open a trafficking investigation. For example, one of the twelve women whom we identified as a potential victim of trafficking told us that she attempted to tell the police that she had been deceived and forced into sex work, and that a friend who had traveled with her to Hong Kong might still be under the control of a “boss” in a vice establishment. She claimed that the police expressed no interest in her story and that she was discouraged from repeating it—even by a social welfare officer, who pointed out that her friend would also probably be sent to jail if the police located her in a vice establishment.

Although none of the women in our study were assisted by a lawyer during the statement taking process, they were invited to consult a “duty lawyer” (Hong Kong’s equivalent of a public defender) the following day when they were brought to the magistrate’s court. Without exception, our interviewees reported that they were advised that their experiences (including the deception by the middlemen, the financial hardship that they had suffered in the Mainland, and the coercion they experienced once they were in Hong Kong) would not constitute a defense to the relevant charges, although they might constitute “mitigating factors” in the sentencing

process.¹⁸⁰ The women were also made aware that a guilty plea would normally lead to a reduction in the standard sentence. Thus, the women had a strong incentive to plead guilty and start serving their time and all fifty-eight of our interviewees had eventually done that. The women who pled guilty to the relatively minor offense of “breach of condition of stay” received sentences from two to three months. However, women convicted of more serious offenses (such as remaining in Hong Kong without authority or making a false statement to an immigration officer by showing a forged or altered visa) received longer sentences, of up to ten months.

After the interviews were concluded, we tested our interviewees’ memories through observations in a magistrate’s court that regularly tries Mainland Chinese women arrested for suspected involvement in sex work. These observations confirmed what our interviewees had told us: the procedures were highly standardized, and it took almost no time to convict a migrant woman from Mainland China who had been arrested for immigration offenses arising from suspected sex work. In one morning session, sixty-five defendants were convicted of “breach of condition of stay” and all but one (who was only sixteen years of age) were sentenced to two months in prison. Thus, it took an average of three minutes to convict and sentence each individual defendant.¹⁸¹

Our follow-up discussions with police, magistrates, and others involved in the system also confirmed that the police were not carefully screening women who were arrested in vice establishments to ascertain whether they might be victims of trafficking. A woman might be considered a victim of sex trafficking (and receive assistance) if she escaped from a brothel and presented herself to the authorities. But the police apparently presumed that women arrested during raids were in the brothels by choice. Moreover, a woman who told the police that she had been deceived about the nature of the job she would do in Hong Kong would not be automatically investigated as a potential victim of trafficking. Rather, her statement would likely be viewed as an admission that she had knowingly traveled to Hong Kong to work illegally. In the eyes of the authorities, the fact that she had intended to work illegally in some other field did not change her status from “lawbreaker” to “victim.”

We concluded that the Hong Kong government should reassess its definition of trafficking victim and conduct more careful interviews of migrant women when they are apprehended, so that those who have been deceived and coerced can benefit from Hong Kong’s victim-protection policies. We did not recommend, however, that Hong Kong treat all

¹⁸⁰ The Administrator of the Duty Lawyer Service advised us that this was standard advice at the time because the court would not consider the fact that a woman was deceived about the nature of the work she would be doing in Hong Kong to be a defense, only a mitigating factor.

¹⁸¹ For a more detailed report of the court observations, see Laidler, Petersen & Emerton, *supra* note 52, at 78.

migrant sex workers as victims of trafficking. The majority of the women in our study had knowingly chosen to come to Hong Kong for sex work and some had made their own travel or working arrangements, without any assistance from third parties—which tends to undermine abolitionist claims that all migrant women found in the sex industry are necessarily victims of trafficking.¹⁸² To label all of these women as victims would deny their agency and could have the additional negative impact of diluting resources from efforts to assist women who are deceived and then find themselves trapped in coercive situations.

The next section reviews developments in Hong Kong since the 2009 TIP Report, including steps that the U.S. TIP Reports have recommended but which might prove controversial in Hong Kong given the history of migration from Mainland China into the territory and the sensitivity of cross-border relations.

D. Hong Kong's Response to the U.S. TIP Reports

Hong Kong was ranked in Tier 1 in the U.S. TIP Reports from 2001 to 2008 but demoted in 2009 to Tier 2, where it has remained for the past six years.¹⁸³ Although Hong Kong still ranks higher than Mainland China,¹⁸⁴ the Hong Kong government is clearly aggrieved by its placement in Tier 2 and has tried to persuade the U.S. State Department and the international community that it has a robust anti-trafficking program.¹⁸⁵ For example, in the area of trafficking for sexual exploitation, Hong Kong has continued to emphasize its anti-vice operations, and it recently claimed to have successfully broken up a number of syndicates that operate illegal vice

¹⁸² My colleague and I drew similar conclusions from a small study of migrant women who work in hostess bars in Hong Kong but occasionally do escort work. *See generally* Robyn Emerton & Carole J. Petersen, *Filipino Nightclub Hostesses in Hong Kong: An Analysis of Vulnerability to Trafficking and Human Rights Violations*, in *TRANSNATIONAL MIGRATION AND WORK IN ASIA* 126 (Kevin Hewison & Ken Young, eds., 2006).

¹⁸³ *See* U.S. DEP'T OF STATE, *supra* note 9.

¹⁸⁴ China has languished in the Tier 2 Watch List for many years and then dropped to Tier 3 in 2013. China had to be either raised to Tier 2 or lowered to Tier 3 in 2013 because Congress placed a limit on the number of years that a country can remain on the Tier 2 Watch List. For an explanation of how this mechanism was applied in 2013, see Teleconference, Luis CdeBaca, Ambassador-at-Large, Office to Monitor and Combat Trafficking in Persons, Briefing on the 2013 Trafficking in Persons Report (June 19, 2013), <http://www.state.gov/j/tip/rls/rm/2013/210906.htm>. China was placed back on the Tier 2 Watch List in 2014. *See* U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT* 132–34 (2014), *available at* <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226700.htm>.

¹⁸⁵ *See, e.g.*, Press Release, Gov't of H.K., Response to U.S. Report on Trafficking in Persons (June 20, 2014), *available at* <http://www.info.gov.hk/gia/general/201406/20/P201406201050.htm>; Danny Lee, *US Human Trafficking Report Misleading, Says Hong Kong*, *S. CHINA MORNING POST* (last updated June 22, 2014, 10:37 AM), <http://www.scmp.com/news/hong-kong/article/1538010/us-human-trafficking-report-misleading-says-hong-kong>.

establishments.¹⁸⁶ The authorities have, however, also continued to arrest thousands of migrant sex workers each year¹⁸⁷ and those who are arrested in raids of illegal brothels were likely working under some form of third-party management.¹⁸⁸ Yet Hong Kong continues to report a small number of cases of sex trafficking—fewer than five cases each year from 2009 to 2013.¹⁸⁹ This naturally raises concerns as to whether Hong Kong has improved its procedures for identifying potential victims of trafficking since we conducted our research.

In this regard, the government has reported that immigration and police officers now receive regular training on human trafficking, including the skills of victim identification.¹⁹⁰ In 2013, the government also distributed an “action card” to guide police and immigration officers on how to identify potential victims of trafficking when they conduct raids on illegal brothels and arrest migrant sex workers.¹⁹¹ Immigration and police officers are now supposed to be on “high alert for any potential victims of human trafficking in the course of their duties,” and should “endeavor [sic] to identify these victims for each operation at the vice-establishments and provide the victims with appropriate assistance including urgent intervention, legal aid, medical consultation and treatment, counseling [sic], shelter or temporary accommodation, and other support services.”¹⁹² If implemented sincerely, these developments (all of which were developed after Hong Kong was demoted to Tier 2 in the U.S. TIP

¹⁸⁶ Replies of Hong Kong, China to the list of issues in relation to the second periodic report of China (E/C.12/CHN/2), including Hong Kong, China (E/C.12/CHN-HKG/3) and Macao, China (E/C.12/CHN-MAC/2) ¶ 53, Comm. on Econ., Soc. and Cultural Rights, U.N. Doc. E/C.12/CHN/Q/2/Add.2 (Mar. 31, 2014) [hereinafter *Replies of Hong Kong to CESCR*] (reporting that five illegal vice syndicates had been broken up and that the offenders had received sentences to up to thirty months’ imprisonment), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fCHN%2fQ%2f2%2fAdd.2&Lang=en.

¹⁸⁷ See Clifford Lo, *64 Mainland Chinese Women Held in Vice Raids at Kowloon Hotels*, S. CHINA MORNING POST (June 12, 2014, 4:31 AM) (citing figures from the Immigration Department indicating that 1,500 sex workers, most of whom were from the Mainland, were arrested in anti-vice operations launched by police and immigration officers in the first four months of 2014; if this rate continues then the authorities will arrest in the range of 6,000 migrant sex workers in the year 2014), <http://www.scmp.com/news/hong-kong/article/1530312/64-mainland-chinese-women-held-vice-raids-kowloon-hotels>.

¹⁸⁸ The government claims to conduct an average of 5,000 anti-vice operations every year, with 3,000–6,000 sex workers arrested each year. See *Replies of Hong Kong to CESCR*, *supra* note 186, ¶ 54.

¹⁸⁹ See *Replies of Hong Kong to CESCR*, *supra* note 186, ¶¶ 53–54.

¹⁹⁰ *Id.* ¶ 55.

¹⁹¹ *Id.*

¹⁹² *Id.* ¶ 54. The Hong Kong government also assured the Committee that immigration officers can grant victims of trafficking an extension of stay or defer their repatriation so that they can assist the government in investigations. However, this is not a new policy and it continues to be applied on a case-by-case basis.

Report) should bring about some improvement over the very cursory interviews at the police station that were described to us by our interviewees in 2005.

Another recent development is that Hong Kong's Department of Justice has issued, in September 2013, a revised Prosecution Code that contains a new section on "human exploitation cases."¹⁹³ The purpose is to provide guidance to prosecutors in identifying and addressing potential victims of exploitation, "having regard to international standards and practices concerning victims of human trafficking in order to promote fair, just and consistent decision-making at all stages of the prosecution process in these cases."¹⁹⁴ While this Code would not necessarily provide an individual with the legal status of "victim of trafficking," the goal should be to ensure that a person is not prosecuted for actions committed simply as a result of their victimization.

What Hong Kong has not done is to agree to be bound by the Trafficking Protocol.¹⁹⁵ Although this is not something that the U.S. TIP Report requires,¹⁹⁶ it would be a positive step from the point of view of the international community. If Hong Kong is not yet ready to be bound by the entire Trafficking Protocol, it could at least agree to amend its domestic anti-trafficking legislation so as to comply with the definition of trafficking contained in the Trafficking Protocol. This has been recommended by the U.S. State Department, which is justifiably concerned by the fact that there is no law expressly prohibiting labor trafficking, despite the well-publicized cases of abuse of migrant domestic workers, both by employment agencies and by employers.¹⁹⁷ Similarly, in

¹⁹³ *Id.* ¶ 57.

¹⁹⁴ *Id.*

¹⁹⁵ Although China became a state party to the treaty in 2010, the Hong Kong government asked to be left out and thus is not bound by the treaty. *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, China-H.K., Feb. 8, 2010, C.N. 45.2010.TREATIES-1 (Depository Notification), *available at* <https://treaties.un.org/doc/Publication/CN/2010/CN.45.2010-Eng.pdf>; Declaration in Respect of Hong Kong and Macao, China-H.K.-Mac., Feb. 8, 2003, C.N 46.2010.TREATIES-2 (Depository Notification), *available at* <https://treaties.un.org/doc/Publication/CN/2010/CN.46.2010-Eng.pdf>.

¹⁹⁶ For example, South Korea was raised to Tier 1 after enacting its tough new law against commercial sex, despite the fact that it still has not ratified the Trafficking Protocol.

¹⁹⁷ *See, e.g.,* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORTS 198-200 (2014), *available at* <http://www.state.gov/documents/organization/226846.pdf>. To be fair, however, Hong Kong does have laws protecting the rights of migrant domestic workers and has frequently initiated prosecutions against abusive employment agencies and employers. The problem (in this author's view) is primarily the "two-week" rule, which makes it difficult for migrant domestic workers to move to a better employer and/or to remain in Hong Kong while seeking remedies for abuses of the law. Interestingly, the two-week rule has not been emphasized in the TIP Reports, but it has been raised frequently by the international treaty monitoring bodies that review Hong Kong; for discussion, see Lee & Petersen, *supra* note 19.

2014, a member of the Hong Kong Legislative Council asked the government whether it would consider updating the legislation so as to better comply with the Trafficking Protocol.¹⁹⁸

Thus far, however, the government has maintained that the existing legislation is adequate.¹⁹⁹ This is unfortunate because even in the context of sex trafficking, Hong Kong's existing legislation is outdated and inadequate. This is partly because it prohibits only cross-border movement for the purposes of prostitution (in or out of Hong Kong), and residents can be victims of sex trafficking without ever leaving Hong Kong. A primary example is the phenomena of "compensated dating" in Hong Kong, which can easily lead to child prostitution.²⁰⁰ Under the Trafficking Protocol, when the alleged victim is a child (defined as a person under the age of eighteen), trafficking has occurred when there has been "recruitment, transportation, transfer, harbouring [sic] or receipt" of the child for the purpose of exploitation; it is not necessary to show that any of the unscrupulous "means" listed in Article 3(a) were used.²⁰¹ Adult men who offer money to have sex with young teenaged girls in Hong Kong can already be prosecuted,²⁰² but they might think more carefully about their actions if they could be prosecuted for trafficking.

Moreover, our interviews with the twelve young women in our study who were deceived and then coerced into sex work in Hong Kong indicate that they were not necessarily victimized by just one "trafficker" who brought them across the border. Rather, the acts of trafficking were spread among several people and some of them (e.g. the *mamasan* or boss who coerced our interviewees to work in the brothels) were operating entirely in Hong Kong and played no apparent role in recruiting the young women or bringing them across the border. A definition of trafficking based upon the Trafficking Protocol would be more useful for prosecuting these individuals because the "act" of trafficking would include not only the transportation but also the harboring or receipt of a person through improper means for the purpose of exploitation.

This is not to suggest, however, that all migrant sex workers from Mainland China should be considered victims under a definition of

¹⁹⁸ See Press release, The Gov't of H.K., LCQ8: Combating Human Trafficking (Feb. 12, 2014), available at <http://www.info.gov.hk/gia/general/201402/12/P201402120349.htm>.

¹⁹⁹ *Id.*

²⁰⁰ See, e.g., Clifford Lo, *Undercover Officers Nab Over 20 Men in Compensated-Dating Scheme*, S. CHINA MORNING POST, (last updated Sept. 6, 2012, 3:40 AM), <http://www.scmp.com/news/hong-kong/article/1030392/undercover-officers-nab-over-20-men-compensated-dating-sting>; Yvonne Tsui, *Girl Chopped Up, Flushed Down Toilet, Court Told*, S. CHINA MORNING POST (July 21, 2009) (describing the murder trial of a man who met his 16-year old victim through a compensated dating scheme and then killed her during a sexual encounter), <http://www.scmp.com/article/687464/girl-chopped-flushed-down-toilet-court-told>.

²⁰¹ Trafficking Protocol, *supra* note 5, at art. 3.

²⁰² For example, they can be charged with soliciting for an immoral purpose.

“trafficking” based upon the Trafficking Protocol. The majority of the women in our study did not claim to have been coerced or deceived into sex work. This is an important point and one that seems entirely overlooked in the annual TIP Report. For example, in 2010, the U.S. TIP Report complained, “contrary to international standards, Hong Kong authorities continued to consider whether potential victims knew that they would engage in prostitution before travel as a factor that excludes them from being identified as victims.”²⁰³ This language implies that Hong Kong should be taking an abolitionist perspective on sex work, which is not required by international law. Rather, under the definition of trafficking in the Trafficking Protocol, the question of whether migrant women knew that they would engage in sex work prior to their voluntary travel to Hong Kong is relevant, as it goes directly to the question of whether a woman was deceived and/or coerced by a third party. Indeed, that was one of our major concerns when we conducted our study—the failure of the police and immigration officers to ask those important questions when they arrested migrant women. The TIP Reports should not be discouraging Hong Kong authorities from asking these questions. Recent TIP Reports have muddled the issue further by complaining that Hong Kong is deporting “thousands of potential victims” of sex trafficking.²⁰⁴ This loose language gives readers the impression that the typical migrant sex worker is a victim of sex trafficking. Yet our interviews of a random sample of women in prison indicate that the majority knowingly came to Hong Kong to conduct sex work, and there is nothing in the literature to suggest any dramatic change in this pattern. Indeed, recent reports indicate that Mainland Chinese sex workers are deliberately coming to Hong Kong to avoid law enforcement in Mainland China, which takes a prohibitionist approach and is known for its harsh treatment of sex workers.²⁰⁵

In addition to making unfounded assumptions of victimhood, the TIP Reports have simultaneously urged the Hong Kong government to grant victims “permission to work and study while participating in trafficking investigations and prosecutions” and to “provide permanent residency visas as a legal alternative to those who may face hardship or retribution in their home countries.”²⁰⁶ While these are admirable goals, they are not required

²⁰³ See U.S. DEP’T OF STATE, *supra* note 86, at 167–68.

²⁰⁴ See, e.g., U.S. DEP’T OF STATE, *supra* note 197.

²⁰⁵ See Lana Lam & Mandy Zuo, *Hong Kong Police Fear Prostitute Influx After Dongguan Vice Crackdown*, S. CHINA MORNING POST (last updated Feb. 16, 2014, 3:42 PM), <http://www.scmp.com/news/hong-kong/article/1428709/hong-kong-police-fear-prostitute-influx-after-dongguan-vice-crackdown>.

²⁰⁶ See, e.g., U.S. DEP’T OF STATE, *supra* note 197.

by the Trafficking Protocol.²⁰⁷ Moreover, such policies could easily become unsustainable if applied to the thousands of migrant sex workers from Mainland China who travel to Hong Kong each year—as virtually all of these women could credibly allege that they are likely to face hardship when returned to the Mainland.²⁰⁸

By giving an unduly expansive interpretation of the obligations contained in the Trafficking Protocol, the TIP Report may make the Hong Kong government even more reluctant to become bound by the treaty or to adopt a legislative definition of trafficking that is based upon it. In order to fully understand this effect, one must appreciate the history of immigration from Mainland China and the rising tensions between Hong Kong residents and Mainland Chinese, despite the fact that the vast majority of Hong Kong residents are the descendants of refugees from Mainland China.²⁰⁹ The Hong Kong colonial government initially maintained a liberal policy, allowing anyone who managed to escape China and reach Hong Kong's urban areas to remain.²¹⁰ A huge wave of migration occurred during China's civil war and immediately after the Communist Party won control in 1949. As result, the population of Hong Kong swelled from only 600,000, at the end of World War II, to 2,360,000 in 1951.²¹¹ But the liberal immigration policies became problematic in the 1960s and 1970s, partly because the Chinese government would occasionally throw open its borders or allow thousands of people to climb the fences and make their way into Hong Kong, overwhelming the territory's supply of housing.²¹² By the early 1980s, the colonial government had reached an agreement with China limiting the number who could migrate to Hong Kong, and it was also

²⁰⁷ While the Trafficking Protocol requires states parties to criminalize trafficking, it only requests that states parties consider providing various forms of victim assistance; nor does it require that a country provide permanent residence for victims of trafficking.

²⁰⁸ Hong Kong arrest and deportation statistics for recent years indicate that the number may have declined since our study. See, e.g., *Facts and Statistics*, H.K. IMMIGR. DEP'T, <http://www.immd.gov.hk/en/facts/investigation.html> (last visited Jan. 21, 2014). However, this is a very difficult number to calculate, partly because women are also being arrested by the police but also because of the evidence that many Mainland Chinese sex workers are moving back and forth across the border, working for a short period of time in Hong Kong and then returning to the Mainland with their profits before they are detected by either police or immigration officers. Interestingly, in 2009, Zi Teng estimated that there were as many as 50,000 migrant sex workers in Hong Kong and that the vast majority comes from Mainland China. See ZI TENG & MIGRANT SUPPORT NETWORK, POSITION PAPER ON THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2009), available at http://www.ziteng.org.hk/aboutus/2009JUN01_e.php (last visited Jan. 20, 2014).

²⁰⁹ See generally Johannes Chan, *The Evolution of Immigration Law and Policies: 1842-2003 and Beyond*, in IMMIGRATION LAW IN HONG KONG: AN INTERDISCIPLINARY STUDY (Johannes Chan & Bart Rwezaura, eds., 2004).

²¹⁰ *Id.*, at 6-12.

²¹¹ NORMAN MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 34 (5th ed. 1991).

²¹² *Id.*, at 234-35.

strictly enforcing laws against illegal migration.²¹³ Reunification in 1997 did not change this basic policy, except that the definition of who enjoys the “right of abode” in Hong Kong is now contained in the Hong Kong Basic Law.²¹⁴

The vast majority of Mainland Chinese citizens still do not enjoy the right of abode and, thus, cannot resettle in Hong Kong. Indeed, there are still many “split families,” with spouses and/or children waiting on the Mainland side of the border for permission to join a family member who has secured residence in Hong Kong.²¹⁵ Although this certainly causes hardship, the ability to control its immigration border is considered an essential element of Hong Kong’s autonomy from Mainland China.²¹⁶

It has, however, become much easier for Mainland Chinese to visit Hong Kong, under the “individual visit” endorsement scheme created in 2003. Mainland Chinese also have become more prosperous in recent decades and they are eager to travel and to shop for the high-quality goods that are available in Hong Kong.²¹⁷ As a result of these factors, the total number of annual visitors from Mainland China to Hong Kong has soared in the past decade, to more than 40 million in 2013—a staggering number given that Hong Kong’s permanent population is only about 7 million.²¹⁸ While this influx of visitors stimulates Hong Kong’s economy, it has also generated angry protests among some residents, who feel that the small territory is being overrun.²¹⁹ The anti-Mainland feelings have been further exacerbated by the rising political tensions between the Central Government and Hong Kong’s democracy movement, the unfortunate delays in the promised democracy reforms, and an ill-conceived “White Paper” in which Beijing insisted that Hong Kong’s autonomy is subject to the overall supervision of the Central Government.²²⁰

²¹³ *Id.*

²¹⁴ See The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China art. 24, § 6.

²¹⁵ See generally, Athena Liu, *The Right to Family Life and the Phenomena of Split Families in Hong Kong*, in IMMIGRATION LAW IN HONG KONG: AN INTERDISCIPLINARY STUDY, *supra* note 209.

²¹⁶ Hong Kong invests enormous resources in keeping illegal migrants out of the territory, in preventing visitors from working illegally in the territory, and even preventing pregnant women from Mainland China from giving birth in Hong Kong. For a summary of these efforts, see the H.K. IMMIGRATION DEP’T, ANNUAL REPORT 2012, ch. 4, available at http://www.immd.gov.hk/publications/a_report_2012/en/ch4/index.htm#c_4_2b.

²¹⁷ See, e.g., Bryan Borzykowski, *The Rise of China’s Super-Rich*, BBC (Feb. 4, 2014), <http://www.bbc.com/capital/story/20140203-the-rise-of-chinas-wealth-dragon>.

²¹⁸ See *Tourism Performance in 2013*, GOV’T OF H.K., http://www.tourism.gov.hk/english/statistics/statistics_perform.html (last visited Jan. 20, 2015).

²¹⁹ See Editorial, *Protests Targeting Mainland Chinese Visitors Put Hong Kong to Shame*, S. CHINA MORNING POST (Feb. 18, 2014, 5:07 AM), <http://www.scmp.com/comment/insight-opinion/article/1429630/protests-targeting-mainland-chinese-visitors-put-hong-kong?page=all>.

²²⁰ INFO. OFF. OF THE ST. COUNCIL, THE PRACTICE OF THE “ONE COUNTRY, TWO SYSTEMS” POLICY IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION (2014), available at

This political and social context inevitably influences the perception of Mainland Chinese sex workers in Hong Kong, who are finding it fairly easy to enter Hong Kong for sex work (now that they can arrange their own tourist visas) but are regularly arrested and prosecuted for violating the terms of that visa or for other offenses related to sex work. The local sex-worker advocacy group, Zi Teng, has worked hard to build sympathy for these women and to protest when the authorities do not respect their rights.²²¹ Zi Teng recognizes that migrant sex workers from Mainland China cannot openly fight for their rights and that they suffer from a double stigma. While this phenomenon is certainly not unique to Hong Kong,²²² it has a particularly strong impact there because the large numbers of migrants and visitors from Mainland China are increasingly seen as a threat to Hong Kong's autonomy and way of life. In this context, it would be unrealistic to expect Hong Kong to take a truly abolitionist approach and treat all migrant sex workers as victims. It would make more sense to encourage the Hong Kong government to amend its legislation so as to adopt the international definition of trafficking and to carefully screen migrant women who come into contact with the authorities to ascertain whether individuals genuinely meet that definition.²²³

V. CONCLUSIONS

The authors of the U.S. TIP Reports deserve credit for drawing attention to weaknesses in Hong Kong's legal framework, particularly the outdated definition of trafficking and its failure to expressly prohibit labor trafficking. Unfortunately, in the field of sex trafficking, the TIP Reports continue to use weak methodology and to assume without evidence or careful analysis that the typical migrant sex worker is likely to be a victim of sex trafficking. The effect of this assumption—particularly when

http://news.xinhuanet.com/english/china/2014-06/10/c_133396891.htm. For a collection of recent articles in Hong Kong's South China Morning Post on this very controversial document, see *Beijing White Paper* 2014, S. CHINA MORNING POST (last visited Jan. 21, 2015), <http://www.scmp.com/topics/beijing-white-paper-2014>.

²²¹ For example, when the UN Committee on Racial Discrimination reviewed Hong Kong and China, Zi Teng and the Migrant Support Network issued a joint position paper that identified police discrimination and abuse as one of the most serious problems faced by migrant sex workers in Hong Kong. See ZI TENG & MIGRANT SUPPORT NETWORK, *supra* note 208.

²²² See Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605 (2009) (discussing of how otherness marginalizes individuals and impedes responses to human trafficking).

²²³ Even that reform may be difficult to obtain as Hong Kong has already faced considerable challenges in complying with its obligation under the Convention Against Torture not to deport a person who claims that s/he will be subjected to torture if returned to his home jurisdiction. See generally Kelley Loper, *Toward Comprehensive Refugee Legislation in Hong Kong? Reflections on Reform of the 'Torture Screening' Procedures*, 39 H.K.L.J. 253, 253-59 (2009). For a summary of what the new Torture Claims Assessment Branch does to screen claimants, see H.K. IMMIGRATION DEP'T, *supra* note 216.

combined with the implied requirement that governments must make a serious and sustained effort to reduce the demand for commercial sex in order to raise their ranking in the TIP Report—is to project an abolitionist view of sex work. There is a strong incentive for governments that have received low rankings to try to please the U.S. State Department, either by cracking down on commercial sex generally and/or by adopting very harsh immigration policies to prevent young migrant women from entering their territories. Yet these are public policy decisions that are not required under international law and should not be imposed through American foreign policy.

Of course, in some countries, an abolitionist approach may well be the most effective way of reducing sex trafficking and the violence against women that can arise in the sex industry. However, this is a decision that should be made locally, with full consideration given to the voices of sex workers in the respective jurisdiction. For example, if the Hong Kong government were to propose criminalizing the purchase of sexual services in order to raise its ranking in the U.S. TIP Report (as South Korea did), there would almost certainly be a very loud protest by Hong Kong's local sex workers, who have been actively lobbying in the opposite direction—for greater legal space and the right of two sex workers to work together for enhanced safety. The Hong Kong feminist movement would also find itself in a difficult position, not only because of the traditional split on this issue within the feminist movement but also because sex worker advocacy groups are active participants in the Hong Kong women's movement and often join coalitions of women's organizations to lobby on particular issues.

The Hong Kong case study reveals the dangers of assuming a single narrative of sex work and of relying upon generalizations rather than careful research of particular jurisdictions. It also calls into question the entire purpose of the annual TIP Report. In theory, the TIP Report is supposed to encourage governments to adopt and enforce the standards set in the Trafficking Protocol. In practice, the TIP Report has become a political tool for certain members of Congress, who have set criteria and "minimum standards" that are not based on international norms. To that extent, the TIP Report may be missing opportunities for advocacy rather than promoting human rights.

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